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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

SERVICE MERCHANDISE COMPANY, INC.
Petitioner,

v.

AMANA REFRIGERATION, INC. and DAVIS-WATKINS COMPANY
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the courts below should have denied summary judgment for the reason that their weighing, evaluation and making of factual findings as to the design, motive, intent and effect of practices challenged as per se violations of section 1 of the Sherman Act (15 U.S.C. § 1) were matters properly reserved for consideration only on the basis of a completed record at a trial on the merits?

2. Whether there is per se liability under section 1 of the Sherman Act for an agreement and concert of action among a manufacturer of brand-name products and its distributors and dealers whereby the distributors sell the manufacturer's products to multi-location dealers such as petitioner at prices agreed to among the manufacturer and the distributors; whereby the manufacturer and its distributors deny supplies of the manufacturer's products to dealers such as petitioner who sell at discount prices; and whereby the manufacturer and its distributors stabilize the price charged by dealers to consumers by limiting distributor and dealer sales to specified territories and customers pursuant to a program establishing economic rewards and sanctions for compliance and noncompliance with the territorial and customer restrictions?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Service Merchandise Company, Inc. ("SMC") petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 23, 1982.

OPINIONS BELOW

The opinion of the court of appeals is reported at 686 F.2d 1190 and is reproduced in the Addendum to this petition. The judgment and opinion of the District Court for the Middle District of Tennessee is reported at 500 F. Supp. 1244 and is also reproduced in the Addendum.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Amendment VII to the United States Constitution, of Rules 38(a) and 56(c) of the Federal Rules of Civil Procedure and of section 1 of the Sherman Act (15 U.S.C. § 1) are set forth in the Addendum, *infra*, at p. 1a.

STATEMENT OF THE CASE[1]

This case began when respondent Davis-Watkins Company ("D-W"), an authorized distributor of respondent Amana Refrigeration, Inc. ("Amana") sued SMC for allegedly selling Amana radarange (microwave) ovens at unreasonably low prices. Addendum at 3a n.2. Amana manufactures microwave ovens and sells them through a national network of 58 independent and 9 wholly-owned distributors and about 3,500 Amana retail dealers. *Id.* at 4a. SMC is engaged in the showroom catalog and mail order business selling name-brand products like microwave ovens from 110 showrooms in 25 states. *Id.* at 3a. The microwave oven is the only recent new major kitchen appliance. *Id.* at 4a. By 1975 there were twenty microwave oven manufacturers with Amana controlling between 11 to 18% of the market. *Id.*

SMC counterclaimed against respondents Amana and D-W alleging that SMC had been denied Amana micro-

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[1] The facts set forth in this statement are taken from the opinion of the court of appeals. We point this out in particular and at the outset for two reasons. First, it is our contention that reversal of the court of appeals' decision is mandated by the very facts which that court states. Second, we do not wish to burden this Court with the constant reminder that the record evidence of respondents' per se violations is far stronger than that set forth by either the trial or circuit court.

wave ovens by reason of: (1) an agreement and concert of action among Amana and its distributors and dealers whereby they fixed the wholesale and retail prices of Amana microwave ovens, (2) boycotted and refused to sell SMC Amana microwave ovens, and (3) allocated among themselves territories and customers for the sale of these products. In addition to its three per se claims of Sherman Act section 1 violation, SMC alleged that Amana's exclusive distribution system unreasonably restrained trade. *Id.* at 2a, 12a-13a.

In August 1980 Amana and D-W moved for partial summary judgment and dismissal of SMC's per se claims. They asserted, and the courts below agreed, that because in their view only "non-price vertical restraints" were involved the case was indistinguishable from *Continental T.V., Inc.* v. *GTE Sylvania, Inc.* 433 U.S. 36 (1977) and should, therefore, be submitted to the jury only under the rule of reason test. After the district court granted summary judgment and dismissed SMC's per se claims, D-W dismissed with prejudice its original complaint of unreasonably low pricing. *Id.* at 2a-3a.

With the issue thus narrowly focused on rule of reason, the case proceeded to trail on SMC's counterclaim and SMC suffered an adverse jury verdict. The jury was neither instructed on, nor was it permitted to consider SMC's three per se claims. The appeal to the Sixth Circuit in this case directly challenged the district court's summary dismissal of SMC's per se claims and, at the same time, the district court's denial of SMC's cross motion for summary judgment on these claims.

On August 23, 1982 the court of appeals affirmed the district court's summary dismissal of SMC's per se claims. The essential predicate for the affirmance was the court's determination that there was "insufficient evi-

dence that a conspiracy or concerted action existed." *Id.* at 16a. With concerted action removed and with it petitioner's per se claims, the court concluded that this case concerned only "non-price vertical restraints originating as unilateral action." *Id.* at 3a, 13a. Accordingly, the court held that these restraints should be tested by the rule of reason standard pursuant to this Court's decision in *Sylvania*. *Id.* at 11a-12a. The court below concluded that Amana's restraints were entitled to rule of reason analysis because "the evidence supports a finding that the restrictions were designed and imposed by Amana to increase Amana's economic efficiency and thereby renders markets more competitive" (*id.* at 14a) and because "SMC has failed to demonstrate that Amana's restrictions were inconsistent with its general marketing strategy." *Id.* at 18a. The court found this "general marketing strategy" to be "supplying an oven plus services." *Id.* at 8a.[2]

In recounting the evidence pertaining to SMC's claim of concerted illegal activity among Amana and its distributors and dealers the court of appeals made the following findings of evidentiary fact:

> 1. "In 1976 SMC attempted to enter the market of retailing a particular model of Amana radarange. Since mid-1978, however, it has been unable to obtain such ovens from Amana, [respondent] D-W or

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[2] The failure of the court on summary judgment to resolve these and other issues of disputed fact in petitioner's favor is exemplified by the court's finding suggesting that SMC was neither willing nor able to market Amana ovens together with services. *Id.* at 8a. SMC was never asked to provide retailer services on Amana products. In fact, it was willing and able to do so. The only question respondent D-W asked of SMC when it sought to purchase Amana ovens was SMC's intended retail price. Addendum at 43a-46a.

any other Amana distributor or dealer." *Id.* at 4a. Amana had a "need to eliminate any free riders from its distribution chain." *Id.* at 19a. "Amana operated several distributorship stores on the same level as D-W." *Id.* at 21a n.14.

2. Prior to 1978 "distributors were free to select retailers without execution of franchise agreements." They were also free to sell wherever they chose. *Id.* at 4a. Also, prior to 1978 SMC attempted to purchase Amana ovens from D-W and "from several other Amana distributors but was denied by each." *Id.* at 6a. At least one distributor refused to sell to SMC at Amana's request. *Id.* at 16a-17a. However, SMC was able to obtain limited supplies of Amana ovens from diverters or brokers. SMC and other discounters then sold these ovens at prices lower than those being charged by Amana's other dealers. These "low prices" brought forth a series of complaints to Amana from D-W and other distributors and dealers asserting, among other things, that "such competition had to be eliminated" and requesting the identity of SMC's supplier. *Id.* at 7a.

3. The "district court's factual finding, that except for the refusal by D-W all refusals to sell to SMC occurred after January 1, 1978, was clearly erroneous. . . . [S]everal refusals to sell occurred in the summer of 1977. *Id.* at 16a n.11.

4. Prior to 1978, in order to discourage "price-shopping" resulting in the sale of Amana ovens at low retail prices, Amana "encouraged and assisted distributors" in a program whereby the distributors agreed with each other that "(1) a distributor would supply the retail outlets in his area only but at agreed prices, or (2) a distributor would supply retailers within and outside his territory but would pay a

commission to the distributor whose territory was affected." *Id.* at 4a-5a.[3]

5. In 1976 Amana confronted a second "serious problem" called transhipping. *Id.* at 5a. Transhipping stemmed from the attempts by Amana distributors and dealers to sell their excess inventories to dealers who transhipped "because they will neither incur service costs nor lose customers." *Id.* at 6a n.4. In order to discourage transhipping, Amana imposed a program whereby "Amana's incentive rewards would be given to the distributor in whose area sold merchandise is used rather than to the selling distributor irrespective of whether the seller is a distributor or dealer." *Id.* at 7a.[4]

6. As part of its program against transhipping, Amana "also warned that the source of its radarranges would be tracked through its computer tracking system." *Id.*

7. Each Amana distributor, beginning in 1978, had a written agreement with Amana, backed by Amana's program against transhipping, whereby the distributor agreed to limit its sales of Amana ovens to specific territories and customers. "Amana sent new authorized dealer sales and service agree-

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[3] Price-shopping occurred, in the words of the court of appeals, "where retailers had outlets in more than one territory, retailers began to buy all of their needed product in the territory with the lowest prices." *Id.* at 4a-5a. We note that retailers with multiple outlets would, of course, comprise large chain operations like SMC.

[4] Transhipping occurred when, in the words of the court of appeals, "ovens were purchased within one territory, where the price was favorable to the purchaser, for resale and/or use within another territory. The purchaser could sell at lower prices because his original purchase was less than that of retailers in the transhipped-to territory." *Id.* at 5a. "Prices set by authorized dealers were undercut by the transhippers. Price competition resulted among Amana dealers and between these dealers and transhippers." *Id.* at 6a.

ments to its distributors for the purpose of imposing these restrictions upon authorized dealers by agreement. As a result of these restrictions, SMC's sources dried up and the Amana radarange was dropped from its catalog." *Id.* at 7a-8a.

8. Respondents have conceded that "Amana's restrictions may have some effect on price" and "that they may result in SMC not being able to obtain the product." *Id.* at 9a.

On the basis of these findings alone, a properly instructed jury would have been warranted—if not compelled—to find in favor of petitioner on its three claims of per se violation.

REASONS FOR GRANTING THE PETITION

Petitioner seeks review here for three important reasons, each of which independently warrants the grant of certiorari.

1. The holding below, made upon material disputed facts and disputed inferences from such facts, that there was neither concerted action nor the requisite intent among Amana and its distributors or dealers to support petitioner's per se claims of price fixing, group boycott and territorial and customer allocations conflicts with this Court's uniform holdings in *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944); *Associated Press* v. *United States*, 326 U.S. 1, 5-6 (1945); *Poller* v. *Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473 (1962) and *Arizona* v. *Maricopa County Medical Society*, ___ U.S. ___, 102 S.Ct. 2466, 2470 (1982) that on a summary judgment motion every genuine issue of disputed fact must be resolved in favor of the party opposing the motion—in this case the petitioner. The holding of the court below stems from gross abuse of the summary judgment procedure, resulting in a deprivation of peti-

tioner's constitutional right to a trial by jury. This fundamental error of the court below departs so far "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 17.1(a) of the Rules of this Court.[5]

2. In affirming the district court's award of summary judgment the court below made crucial findings of evidentiary fact which established petitioner's per se claims of concerted price fixing, group boycott and territorial and customer allocations. Its holding that such conduct is to be tested by the rule of reason conflicts with this Court's holdings, among others, in *Arizona* v. *Maricopa County Medical Society*, *supra*, 102 S.Ct. at 2475; *United States* v. *General Motors Corp.*, 384 U.S. 127, 144-46 (1966) and *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 608 (1972) that such conduct is illegal per se.

3. In holding that restraints of the sort imposed by Amana on its distribution system are to be tested by the rule of reason, the court below misconstrued and misap-

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[5] We suggest that the errors of the court below are so plain that briefing on the merits is unnecessary and that this Court should not only grant the petition but should, at the same time, reverse the judgment below and either direct entry of judgment for petitioner on the liability question or, at the least, remand this case to the district court for a jury trial on petitioner's per se claims. In this connection, we note that in Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) this procedure of summary reversal on grant of certiorari was invoked by this Court where the Ninth Circuit had improperly refused to apply the per se liability rule. We further note, *infra* at 16, that use of this summary reversal procedure in *Catalano* was cited with approval by this Court in Arizona v. Maricopa County Medical Society, *supra*, ___ U.S. ___, 102 S.Ct. at 2475. The same considerations, we suggest, call for use of the same summary reversal procedure in the present case.

plied this Court's holding in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) and placed itself in direct conflict with the holding of the Court of Appeals for the Third Circuit in *Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979). If indeed the *Sylvania* case is to be extended to accord rule of reason treatment to price fixing agreements, group boycotts and territorial and customer allocations imposed on the manufacturer's distribution system with the intent that the restraints eliminate both vertical and horizontal competition, then such a holding is one of vital significance to the national economy and to effective administration and enforcement of the Nation's antitrust laws which ought to be announced by this Court—not by the court below in summary judgment proceedings.[4]

The essential basis for this petition is that in affirming the summary dismissal of petitioner's three per se claims, the court of appeals conducted factual inquiries it was not empowered to make under a standard of review which misallocated the burden of persuasion, and yet having made findings of evidentiary fact which established price fixing, group boycott and territorial and customer allocations, the court rejected or ignored the legal force of its own findings. The effect of such affirmance is to ignore

[4] We note that the holding of the court below condones and encourages resale price maintenance imposed upon vendors of brand name products through systems, such as Amana's, of private enforcement complete with private economic sanctions and penalties. Such a policy is inconsistent with the policy adopted by Congress when it repealed the Miller-Tydings Act. See Section 2 of the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145 (Dec. 12, 1975). This Court should not permit the imposition of private barriers to the substantial commerce in brand name products to replace the statutory barriers so recently removed.

the longstanding and uniform holdings of this Court that the respondents' business practices challenged by petitioner are per se violations of section 1 of the Sherman Act.

I.

The Holding Below Deprives Petitioner Of Its Right To Trial By Jury By Reversing The Roles Of The Parties In Summary Judgment Proceedings

Rule 56(c), Fed. R. Civ. P. provides that summary judgment should be granted only where "there is no genuine issue as to any material fact." In *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944) this Court held that "[T]he purpose of the [summary judgment] rule is not to cut litigants off from their right of trial by jury if they really have issues to try." Particularly with respect to antitrust cases, this Court admonished in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962) that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."

When, as in this case, a summary judgment motion is made on the issue of per se liability, every reasonable factual inference must be drawn against the party making the motion (Amana and D-W) and in favor of the party opposing the motion (SMC). Just last term this Court reemphasized this very basic principle. In *Arizona* v. *Maricopa County Medical Society*, ___ U.S. ___, 102 S.Ct. 2466, 2470 (1982) the petitioner, State of Arizona, had moved for and been denied summary judgment on the issue of whether the respondent medical societies had engaged in the price fixing alleged. This Court held:

> "Because the ultimate question presented by the certiorari petition is whether a partial summary judgment should have been entered by the District Court, *we must assume that the respondents' version of any disputed issue of fact is correct.*" Emphasis supplied.

In the present case, the court below in the face of clear and convincing contrary evidence, determined that there was "insufficient evidence" of "concerted action" among Amana and its distributors or dealers. Addendum at 16a. It affirmed summary judgment for respondents because, in its words, "the evidence supports a finding that the restrictions were designed and imposed by Amana to increase Amana's economic efficiency and thereby render markets more competitive." *Id.* at 14a. Conversely, the court determined that "SMC has failed to demonstrate that Amana's restrictions were inconsistent with its general marketing strategy." *Id.* at 18a. Plainly, the court has reversed the proper roles of the parties in summary judgment proceedings by placing the burden of persuasion upon the party opposing the motion—in this case SMC. This role reversal stands the summary judgment procedure on its head.

It is equally clear from this recitation that the court below viewed as paramount the motive and intent behind the challenged business practices of Amana. Were they designed and imposed unilaterally to increase economic efficiency as Amana contended and as the court below found, or were they designed and imposed by concerted action in order to fix price, boycott and allocate territories and customers as petitioner contended? *Id.* at 12a-22a. Again, just last term this Court in *Pullman-Standard* v. *Swint*, ___ U.S. ___, 102 S.Ct. 1781, 1790 (1982) reaffirmed its holding in *United States* v. *Yellow Cab Co.*, 338

U.S. 338, 341 (1949) that " 'finding as to the design, motive and intent with which men act' [are] peculiarly factual issues for the trier of fact"—in this case the jury.

The court below itself made evidentiary findings from which the conclusion is inescapable that Amana and its distributors and dealers acted in concert for the purpose and with the intent and effect claimed by petitioner. The court found as evidentiary fact that the low retail prices charged by petitioner and other discounters precipitated complaints and calls for action (including the elimination of SMC as a competitor) from Amana's distributors and dealers. Addendum at 7a. Thereafter, Amana and its distributors refused to sell to petitioner and on at least one occasion such refusal was at Amana's request.[7] *Id.* at 7a-8a, 16a-17a. In order to deal with low retail pricing, Amana "encouraged and assisted" its distributors in two closely related price fixing and market allocation programs whereby the distributors, in selling to multi-location accounts like SMC, sold Amana's products at "agreed prices," compensated each other for sales made within each other's territories, and agreed to a system of economic sanctions and rewards designed to discourage transhipping. *Id.* at 4a-8a. Amana implemented these programs with a surveillance warning to its distributors and dealers that sources of supply to companies like peti-

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[7] The court of appeals determined that the district court's highly relevant finding substantially understating the number and timing of these refusals to deal was "clearly erroneous." *Id.* at 16a n.11. Yet, incredibly, the court of appeals dismisses this error as "harmless." *Id.* Of course, the stringent "clearly erroneous" test of Rule 52(a), Fed. R. Civ. P., is reserved for appellate review following a trial on the merits.

tioner would be "tracked through [Amana's] computer tracking system." *Id.* at 7a. Finally, respondent Amana in 1978 finished the job by putting in place a network of written distributor and dealer agreements which the court below found "dried up" petitioner's source of supply thereby eliminating it from the business of selling Amana's microwave ovens. *Id.* at 7a-8a. In language particularly applicable here, this Court in *United States* v. *General Motors, supra*, 384 U.S. at 144-46 stated:

> What resulted was a fabric interwoven by many strands of joint action to eliminate the discounters from participation in the market, to inhibit the free choice of franchised dealers to select their own methods of trade and to provide multilateral surveillance and enforcement. This process for achieving and enforcing the desired objective can by no stretch of the imagination be described as "unilateral" or merely "parallel." [Citations omitted.]
>
> There can be no doubt that the effect of the combination or conspiracy here was to restrain trade and commerce within the meaning of the Sherman Act. Elimination, by joint collaborative action, of discounters from access to the market is a per se violation of the Act. [384 U.S. at 144-45.]

After reviewing its prior decisions on concerted boycott, this Court continued:

> The principle of these cases is that where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct. [Citation omitted.] Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins or their system for distributing automobiles, ... [384 U.S. at 146.]

In the present case, upon its own factual findings, the court of appeals should have reversed the summary dismissal of petitioner's per se claims because there were genuine issues of material disputed fact.

Even if the court below, rather than the jury, was the proper forum for the conduct of the factual analysis in which it engaged—which we strenuously deny—the manner of the analysis was so plainly incorrect that reversal is required.

In the first place, it is clear that the court below took each item of petitioner's proof and viewed it separately and in isolation from every other item. For example, had the court viewed its own factual findings as a unified whole, it could not have escaped the conclusion that it was as equally likely as not that Amana's challenged business practices complete with surveillance methods, were prompted by and in direct response to the unified complaints and calls for action from its distributors and dealers concerning petitioner's low prices. This equals unlawful concerted action which the court below found did not exist. *E.g.*, *United States* v. *General Motors*, *supra*, 384 U.S. at 131-36, 142-43. The failure of the courts below to, at a minimum, deny respondents' summary judgment motion is not only at odds with this Court's holdings in *Associated Press*, *Sartor*, *Poller*, *Maricopa*, *Yellow Cab* and *Pullman-Standard*, it violates this Court's holding in *Continental Ore Co.* v. *Union Carbide*, 370 U.S. 690, 698-99 (1962) that petitioner "should be given the full benefit of [its] proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each."

In the second place, the court's own evidentiary findings establish—indeed they state—price fixing, group boycott and territorial and customer allocations by con-

certed action. This is a separate, and equally compelling ground for reversal. We deal with this ground in the next section of this argument.

II.

The Holding Below Conflicts With The Uniform Holdings Of This Court That Price Fixing, Group Boycott And Territorial And Customer Allocations Are Per Se Violations Of Section 1 Of The Sherman Act

The evidentiary findings of the court below reflect business behavior on respondents' part which can only be described as bold and relentless—if not predatory. As shown above, this case is a near carbon copy of *United States* v. *General Motors*, *supra*, 384 U.S. at 144-46 where this Court held that concerted activity among General Motors and its dealers intended to prevent discounters from selling Chevrolet automobiles was a per se group boycott. The court below attempted to distinguish *General Motors* by finding "[t]here is no evidence in the record that any of the distributors or dealers by concerted action among themselves and with Amana refused to deal with SMC." Addendum at 16a. As we have demonstrated in part I of this argument, that fact determination should have been left to a properly instructed jury.

Further, having improperly assumed a fact-finding role, the court of appeals proceeded to make evidentiary findings compelling the conclusion that Amana and its distributors engaged in concerted price fixing, refusals to deal and territorial and customer allocations in direct response to distributor and dealer complaints about the low retail prices of petitioner and others. *Id.* at 4a-17a. Its failure to conclude that respondents had violated section 1 of the Sherman Act can only be attributed to an attempt by the court to accord rule of reason treatment to per se behavior. *Id.* at 14a. In pursuing this attempt, the court

below tortured both the letter and spirit of this Court's holding in *Continental T.V.*, v. *GTE Sylvania*, *supra*, 433 U.S. at 41, 57-59, that *non-price vertical distribution restraints* are subject to the rule of reason test. It did so by concluding that Amana's highly price-oriented series of concerted restraints were in fact unilateral vertical non-price restraints. Having thus converted this case into one barely recognizable as petitioner's case, the court below then enveloped the case with the protective cover of *Sylvania*. This was plain error.

In *Arizona* v. *Maricopa County Medical Society*, *supra*, ____ U.S. ____, 102 S.Ct. at 2469, 2475, this Court confronted the idea that the *Sylvania* case suggested an emerging trend to afford rule of reason treatment to per se practices.[8] In holding that it was error for the courts below to have failed to conclude that an agreement among competing physicians setting maximum fees for their health services was a per se violation of section 1 of the Sherman Act this Court observed:

> We have not wavered in our enforcement of the *per se* rule against price fixing. Indeed, in our most recent price fixing case we summarily reversed the decision of another Ninth Circuit panel that a horizontal agreement among competitors to fix credit terms does not necessarily contravene the antitrust laws. *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980).
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> [*Id.* at 2475.]

The error committed by the court of appeals in this case was, therefore, double barrelled. First, it improperly

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[8] Indeed, in *Sylvania* this Court found as "most important" the jury's consideration and rejection of the price fixing claim. 433 U.S. at 41 n.9.

assumed a fact-finding role. Second, having done so, when it found as it did (Addendum at 4a-9a) that distributors (including respondent D-W) and dealers complained about the low prices of SMC and other discounters and called for action including the elimination of SMC; that Amana "to discourage price shopping encouraged and assisted" its distributors in selling to multi location retailers "at agreed prices"; that Amana "encouraged and assisted" the distributors in paying commissions to each other for sales in each others' territories; that Amana announced and implemented a program of economic sanctions and "incentive rewards" to discourage "transhipping" backed up by its "computer tracking system"; that Amana told at least one distributor not to sell to SMC; and that Amana finally "dried up" SMC's sources of supply by the use of exclusive territorial and customer restrictions and imposed "these restrictions upon authorized dealers by agreement" the court was left with no proper alternative but to hold that respondents had violated section 1 of the Sherman Act. In *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-22 (1940), this Court condemned "[a]ny combination which tampers with price structures . . . ." In *United States* v. *General Motors*, *supra*, 384 U.S. at 144-46 this Court condemned all forms of "joint collaborative action" for the "[e]limination . . . of discounters from access to the market . . . ."[9] And in *United States* v. *Topco Associates*,

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[9] This elimination of discounters necessarily results in the per se restraint of trade prohibited by section 1 of the Sherman Act and frustrates the basic goal of the Act to insure the free-market force setting of prices. Any such agreement or other conduct that interferes with the setting of prices by free market forces, even where the agreement is not price fixing as such, is illegal per se. National Society of Professional Engineers v. United States, 435 U.S. 679, 692-93 (1978). The need for invoking the per se rule in such a case

Inc., *supra*, 405 U.S. at 608-09, this Court condemned facially vertical territorial restraints which in purpose and operation are horizontal as "naked restraints of trade with no purpose except stifling of competition."

III.

The Sixth Circuit's Holding Creates A Conflict Among The Circuits In The Interpretation Of This Court's Decision In *Continental T.V., Inc.* v. *GTE Sylvania Inc.*

The Third Circuit was presented with substantially the same fact situation in *Cernuto, Inc.*, v. *United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979), where that court was ". . . confronted . . . with the termination, by a manufacturer of kitchen cabinets, of one of its customers, a discount house, at the urging of another customer, a retailer, allegedly because of price consideration." 595 F.2d at 165. The case had been decided adversely to the plaintiff on defendant's motion for summary judgment. The court reversed and remanded for trial. *Id.*

Lappin Company, a United Cabinet distributor, had agreed to supply Cernuto, Inc., a discount house, with United cabinets for a two year period. Famous Furnace & Supply Co., a retail competitor, allegedly complained to United about Cernuto's price competition. United then refused to supply cabinets for Lappin to sell to Cernuto. Cernuto alleged this conduct to be a per se violation of section 1 of the Sherman Act.

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precludes consideration of any alleged factual justification for the restraint, including the claim that the restraint protects public safety and health. *Id.* at 693-95. Similarly, in the present case the notion that SMC and other discounters were so-called "free riders" who sold Amana's products without providing services cannot be used as a justification for the bundle of concerted restraints aimed directly at petitioner SMC and other discounters.

In marked contrast to the Sixth Circuit rejection of the well established standard for review of summary dismissals, the Third Circuit said:

> "Because this appeal concerns a grant of summary judgment, we must view the record in the light most favorable to the plaintiff, and consequently must *infer* that Famous' conduct was the cause of United's decision to terminate Cernuto's supply, and that Famous was motivated by direct price competition between it and Cernuto." [595 F.2d at 165.] Emphasis supplied.

Having described the inference to which petitioner SMC clearly was entitled in this case, the *Cernuto* court defined the issue as ". . . whether the conduct at issue here—a manufacturer deliberately withdrawing its product from a distributor that resold it for a price less than its competitors at the request of a competitor—should be classified as a *per se* violation of the Act." The court held that it should be thus classified. 595 F.2d at 166. The Third Circuit properly concluded that this Court's decision in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.* was not intended to apply the rule of reason test to restraints which, while vertical in the sense of being applied by a manufacturer to its distributors or dealers, are in fact horizontal in their intended and actual effect. 595 F.2d at 167-69. As the *Cernuto* court put it:

> "[I]f the action of a manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier. Therefore, although the termination in such a situation is, itself, a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer, level."
>
> [*Id.* at 168.]

The present case cannot be distinguished from *Cernuto* in any material respect. Amana's distributors (including respondent D-W) and dealers complained to Amana about SMC's low retail prices stating that "such competition had to be eliminated." Addendum at 7a. At least one distributor prior to 1978 refused to sell to SMC at Amana's request. *Id.* at 16a-17a.[10] Amana "warned that the source of its radaranges would be tracked through its computer tracking system. *Id.* at 7a. And Amana's subsequent restrictions "dried up" SMC's sources of supply. *Id.* at 8a. Thus did Amana assuage its distributors and dealers, thereby eliminating the low price competition of SMC. If there is any difference between *Cernuto* and this case it is only one of degree—Amana's restraints being national and more sweeping.

The view of the court below that this case is controlled by *Sylvania* because it involved only "vertical restraints, originating as unilateral action" rather than as horizontal concerted action as petitioner contended (*id.* at 12a) is thus belied by the court's own findings of evidentiary fact. The court's analysis abandons years of settled antitrust principles, gives *Sylvania* an unwarranted and unintended extension, and sets the Sixth Circuit apart in the evaluation of summary judgment motions in antitrust cases.

Should any doubt remain that this is not a *Sylvania* case it is dispelled by the undisputed testimony of distributor respondent D-W's president which the courts

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[10] The courts below made no findings concerning the undisputed testimony of Amana's Little Rock distributor that Amana representatives told him prior to 1978 "that penalties would be severe for selling people such as Service Merchandise." *Id.* at 47a.

below failed to credit. It leaves no reasonable doubt that this is a price oriented per se case of horizontal concerted activity among Amana and its distributors and dealers to eliminate price competition at the horizontal level. Thus, at a January 1977 meeting between D-W's president and his dealers the following transpired:

> Q. What did you tell the dealers you were going to do?
>
> A. We told them at the time we didn't know what we could do. We listened more to them, and at the time we did not know of any action or counteraction, other than we would endeavor to try to stop some way the pricing and the competition that they were experiencing from Service Merchandise. . . .
>
> Q. You did not indicate to them that you were taking or going to take steps to see if you could not stop the situation?
>
> A. We told them we were investigating what the alternatives were toward stopping the situation.
>
> Q. What did you do?
>
> A. Well, basically, we tried to prevail upon Amana to help us stop the transhipping. . . ."
>
> [*Id.* at 48a-49a.]

Amana did "help", as the court below found, with an economic program aimed directly at transhipping and discount pricing monitored through the surveillance program provided by Amana's "computer tracking system." *Id.* at 7a.

CONCLUSION

Whether considered separately or cumulatively, the errors committed by the court below are so egregious and so plain that the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be summarily reversed and judgment should be entered for petitioner on the issue of liability.

Respectfully submitted,

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November 19, 1982

CERTIFICATE OF SERVICE

I hereby certify that on this 19 day of November 1982, three copies of this Petition and Addendum were mailed, postage prepaid, to counsel for each respondent, as follows:

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ADDENDUM

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1. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

RULE 38(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE

The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

RULE 56(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

SECTION 1 OF THE SHERMAN ACT (15 U.S.C. § 1)

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

II. OPINIONS AND JUDGMENTS BELOW

A. Opinion Of The United States Court Of Appeals For The Sixth Circuit

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT.

No. 81-5057.

DAVIS-WATKINS COMPANY,
Plaintiff-Counter
Defendant-Appellee,

and

AMANA REFRIGERATION, INC.,
Counter Defendant-Appellee,

v.

SERVICE MERCHANDISE,
Defendant-Counter
Plaintiff-Appellant.

Before MARTIN and CONTIE, Circuit Judges, and TUTTLE, Senior Circuit Judge.*

CONTIE, Circuit Judge.

Service Merchandise Company, Inc., (SMC) appeals the disposition of its antitrust counterclaims brought under section 1 of the Sherman Act, 15 U.S.C. § 1, against Amana Refrigeration, Inc., (Amana) and the Davis-Watkins Company (D-W). SMC asserts that the district court erroneously dismissed its per se theories of price stabilization, group boycott and horizontal market divisions on cross-motions for summary Judgment.[1] SMC also asserts that the jury was erroneously

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* Honorable Elbert P. Tuttle, Senior Judge of the United States Court of Appeals for the Eleventh Circuit, sitting by designation.

[1] At the district court, SMC contended that its claim of illegal vertical market divisions should be analyzed under a per se analysis. SMC concedes, however, that vertical non-price restraints are properly analyzed under the rule of reason. *See Davis-Watkins Co.* v. *Service Merchandise Co.*, 500 F. Supp. 1244 (M.D.Tenn. 1980).

instructed on the application of the rule of reason under its vertical restraint claim.[2]

In August 1980, Amana and D-W filed for partial summary judgment on SMC's per se claims alleging that this case was indistinguishable from the case *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). They asserted that inasmuch as SMC challenges non-price vertical restraints the case should be submitted to the jury only under the rule of reason test. SMC responded with a cross-motion requesting judgment on all of its claims. The district court granted Amana and D-W's motion finding the case to be controlled by *Sylvania, supra*.

The case, therefore, was submitted to the jury only under the rule of reason and only in regard to non-price vertical restraints. And, after a seven-week trial, the jury returned a verdict in favor of the appellees finding no restraint of trade in violation of 15 U.S.C. § 1.

I.

SMC is a Tennessee corporation engaged in a showroom catalog business marketing name-brand consumer goods and jewelry for retail sales from 110 showrooms in 25 states. Sales occur either through the mails or in one of SMC's showrooms. Amana is a Delaware corporation that manufactures household appliances, including countertop microwave ovens for household use. D-W is Amana's exclusive distributor for the territo-

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[2] This action was initially commenced by D-W alleging that SMC was practicing predatory pricing in violation of the Sherman Act and the Robinson-Patman Act, 15 U.S.C. § 13(a). By order of the district court this claim was dismissed on October 10, 1980. SMC counterclaimed, however, against D-W and Amana under the theories stated above and the disposition thereof by the district court is what has been appealed.

ry of central Tennessee and adjoining parts of Alabama, Georgia and Kentucky.[3]

In 1976 SMC attempted to enter the market of retailing a particular model of Amana radarange. Since mid-1978, however, it has been unable to obtain such ovens from Amana, D-W or any other Amana distributor or dealer. SMC contends that the reason it has been unable to obtain any Amana radarange ovens is that Amana and its distributors have established geographic, customer and location restrictions in order to maintain and enhance wholesale and retail prices, to insulate distributors from price competition from other distributors and dealers and to prevent SMC and other discount retail dealers from dealing in Amana countertop microwave ovens.

The microwave oven industry has recently emerged, marketing the only "new" major kitchen appliance. By 1975 there were 20 manufacturers and 27 different brands of microwave ovens. Amana, however, was one of the first producers of countertop mircowave ovens. And, during the period 1972 through 1979 Amana controlled between 11% to 18% of this market. Amana has built up a certain degree of prestige within the industry as a result of its market position.

Prior to January 1, 1978, Amana distributors were assigned by agreement to a primary territory for concentration of sales efforts. Distributors were free to select retailers without execution of franchise agreements and they were not prohibited from selling outside of their primary territory.

Also during the period prior to 1978, wholesale and retail prices varied as much as 30% between territories due to differing distributor and dealer transportation and operating costs. Because of this difference in price two marketing problems

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[3] Amana has 58 independent and 9 wholly-owned exclusive distributors throughout the United States, each operating under a separate written distributor agreement. There also exists approximately 3500 authorized Amana retail dealers.

developed in Amana's distribution system: retailer price-shopping and transhipping. First, where retailers had outlets in more than one territory, retailers began to buy all of their needed product in the territory with the lowest prices. To discourage price-shopping, therefore, Amana encouraged and assisted distributors in two types of selling arrangements to such retailers: 1) a distributor would supply the retail outlets in his area only but at agreed prices, or 2) a distributor would supply retailers within and outside his territory but would pay a commission to the distributor whose territory was affected.

The second problem, related to retailer price-shopping, known as transhipping, occurred when ovens were purchased within one territory, where the price was favorable to the purchaser, for resale and/or use within another territory. The purchaser could sell at lower prices because his original purchase was less than that of retailers in the transhipped-to territory.

These problems and especially transhipping did not present a problem to Amana or its distributors until late 1976. Before the end of 1976 the demand for Amana radaranges continued to increase so that distributors did not accumulate large inventories. Consequently, absent a need to unload inventories, there was very little transhipping between territories. However, inventories began to accumulate in 1976 and transhipping became a serious problem within Amana's marketing system.

Amana increased its production of countertop microwave ovens from 173,000 units in 1975 to 321,000 units in 1976. During 1976, however, several Japanese manufacturers entered the microwave market which caused a decrease in market demand for Amana radaranges. For example, the general market increased from 1,749,000 units in 1976 to 2,157,000 units in 1977 but Amana's share of the market dropped from 18% to 11%. Amana decreased the number of units shipped to distributors from 321,000 units in 1976 to 240,000 units in 1977. The accumulation of large inventories by Amana's distributors

and dealers caused them to seek outlets to unload upon. Consequently, transhipping began to occur with increased frequency.

As a result, unauthorized dealers were obtaining Amana ovens at low prices in one territory for resale in another territory. Prices set by authorized dealers were undercut by the transhippers. Price competition resulted among Amana dealers and between these dealers and transhippers. It is important to note, however, that the unauthorized dealers who were transhipping were outside the Amana marketing system and were thereby able to offer a low price because they offered no product services. Unlike Amana's authorized distributors and dealers, the transhipper did not incur the cost of providing services associated with Amana's microwave ovens. Such services were, however, necessarily offered by the authorized Amana distributors and dealers.[4]

In November of 1976, while large inventories of Amana microwave ovens were accumulating, SMC attempted to purchase one Amana radarange model from D-W. SMC requested 600 ovens but D-W refused to fill the order. From that time until mid-1978, SMC attempted to obtain the ovens from several other Amana distributors but was denied by each.[5] SMC did obtain radaranges from diverters, however, in 1976 and 1977 and sold them at lower prices than did Amana dealers.[6]

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[4] The authorized distributor or dealer who has an excess inventory will sell to unauthorized dealers who tranship because they will neither incur service costs nor lose customers. Such service costs, both pre-sale and post-sale, are incurred in the territory in which the product is ultimately sold.

[5] SMC attempted to purchase from 7 other Amana distributors prior to 1978, four of whom were located in areas where SMC had showrooms, but sales were refused.

[6] A diverter is a broker of products who buys from authorized dealers or distributors with the purpose of diverting such products to a destination or to a purpose different from what is represented when the products are purchased.

In December of 1976, D-W by letter complained to Amana concerning SMC's low prices, attaching a copy of an SMC advertisement of Amana radaranges, and asserting that such competition had to be eliminated. Starting in January of 1977, Amana received other complaints from other dealers and distributors concerning SMC's low prices as well as the low prices of other unauthorized discount and catalog-showroom dealers. Also during this period, D-W requested that Amana supply it with the identity of the transhipper.

On October 3, 1977, Amana announced to its distributors a clarification of its policy on transhipping. The crux of the clarification notice was that Amana's incentive rewards would be given to the distributor in whose area sold merchandise is used rather than to the selling distributor irrespective of whether the seller is a distributor or dealer. The incentive programs included were the profit opportunity program (distributor profits increased as volume sales increased), merchandising and promotional allowances, display programs, coop programs and special advertisement programs. Amana also warned that the source of its radaranges would be tracked through its computer tracking system.[7]

Starting on January 1, 1978, Amana revised its distributor agreements by adding the following resale restrictions: 1) distributors agreed to sell only to authorized Amana dealers, 2) authorized dealers had to be located within the distributor's exclusive territory, 3) distributors had to obtain the agreement of authorized dealers to restrict resales from their authorized locations and only to consumers, and 4) distributor prom-

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[7] It is important to recognize at this point that the United States Supreme Court issued the decision in *Continental T.V., Inc.*, v. *GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977) effectively changing the law with respect to vertical non-price restrictions imposed by a manufacturer in the summer of 1977. With this change Amana began imposing restrictions upon its distributors and dealers with regard to the sale of its radaranges.

otional and service charge-back policy pursuant to the October 3, 1977, transhipping letter remained in effect. In February, Amana sent new authorized dealer sales and service agreements to its distributors for the purpose of imposing these restrictions upon authorized dealers by agreement. As a result of these restrictions, SMC's sources dried up and the Amana radarange was dropped from its catalog.

II.

At issue in this case are two divergent marketing strategies. Amana's marketing strategy is aimed at enhancing interbrand competition whereas SMC's marketing strategy is aimed at enhancing intrabrand competition. Amana markets its ovens with a strategy of supplying an oven plus services. SMC, on the other hand, attempted to market the ovens without supplying any services.

The services that Amana requires of its distributors and dealers are of three types: pre-sale, point-of-sale and post-sale services. Pre-sale services include advertisements, special displays, proper display of a full line of Amana ovens, in-store demonstrations, cooking instructions and trained salespersons on the floor to answer questions. Point-of-sale services include in-store demonstrations and the availability of trained salespersons. Post-sale services include warranty service, product maintenance and repair services and cooking schools. The cost of such services is shared by Amana, the distributors and the dealers so that all have a stake in the marketing of Amana's ovens. The services are promoted by Amana through promotional and incentive programs, cost-sharing discount sales programs, demonstration programs, accessory give-away programs and advertisement programs.

In promoting these services, Amana is attempting to compete on the interbrand market of microwave ovens by offering a product plus services at a competitive price. Amana recognizes that the product can be sold at a lower price where such services are eliminated. But Amana also contends that its

market strategy cannot survive where some dealers sell the product at a low price without providing the accompanying services. Further, Amana contends that if price competition is the sole basis on which unauthorized dealers compete, authorized dealers will not have an incentive to share the cost of services with distributors because the competition providing just the product without any accompanying services creates a "free rider" effect upon those who do provide services.[8]

The restrictions imposed by Amana upon its authorized distributors and dealers both before and after January 1, 1978, were designed to enhance Amana's market strategy of providing their product plus services. Indeed, during the course of oral argument, counsel for Amana and D-W stated that they do not deny that Amana's restrictions may have some effect on price nor that they may result in SMC not being able to obtain the product.

III.

Section 1 of the Sherman Act proscribes "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . ." 15 U.S.C. § 1. In recognizing that every trade agreement restrains trade, the Supreme Court has held that only unreasonable contracts, combinations or conspiracies in restraint of trade are illegal. *Standard Oil Co.* v. *United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed.2d 619 (1911). To

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[8] The "free rider" problem arises where pre-sale, point-of-sale or post-sale services are offered by the manufacturer's authorized distributors and dealers. Discounters are tempted by market forces to obtain and retail the same product without offering such services. Because the discounter does not incur the cost of providing services, it is able to offer the "raw" product at lower prices. Further, consumers are able to obtain and take advantage of the services provided by the authorized distributors and dealers while ultimately purchasing from the discounter. Finally, the authorized distributors and dealers are thereby required to offer services by the manufacturer without obtaining the benefit of retail sales.

establish a claim under section 1, the plaintiff must establish that the defendants contracted, combined or conspired among each other, that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets, that the objects of and conduct pursuant to that contract or conspiracy were illegal and that the plaintiff was injured as a proximate result of that conspiracy. *Fleer Corp.* v. *Topps Chewing Gum, Inc.*, 658 F.2d 139, 147 (3d Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1715, 72 L.Ed.2d 137 (1982). Generally, market conduct is analyzed under the rule of reason test for a determination of whether such conduct is illegal under section 1 of the Sherman Act. In *Chicago Bd. of Trade* v. *United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918), the classic description of the rule of reason was given:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant facts.

Id. at 238, 38 S.Ct. at 243.

Some market conduct, however, is analyzed under an illegal per se test on the basis that such conduct is manifestly anticompetitive. The Supreme Court has stated:

> Certain agreemnts or practices . . . because of their pernicious effect upon competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are prescribed by the Sherman Act more certain to the benefit of everyone

> concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

Northern Pac. Ry. Co. v. *United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). Practices generally found to be illegal per se are group boycotts, price-fixing, horizontal market divisions and tying arrangements.[9]

It is well settled that unilateral action within a particular market is not a violation of section 1. *United States* v. *Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919). Section 1 requires proof of "concerted action". Further, restraints imposed by a manufacturer or supplier upon its distributors or retailers, so-called "vertical" restraints, are generally found to be potentially beneficial to interbrand competition. Analysis of vertical restraints, therefore, requires the application of the rule of reason. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). However, restrictive agreements among independent business entities at the same level of the market, so called "horizontal" agreements, are found to have a pernicious effect upon competition

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[9] Group boycotts are concerted refusals by traders to deal with other dealers, *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1957); price-fixing is any combination or concerted action that is formed for the purpose or with the effect of raising, depressing, fixing or stabilizing the price of a commodity in interstate or foreign commerce, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); horizontal market divisions are agreements between competitors to allocate markets, *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972); tying arrangements are agreements to sell a product on the condition that the buyer also purchases a different product or at least agrees not to purchase the product from any other supplier, *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958).

and to lack redeeming virtue, so that analysis proceeds under a per se illegal rule. *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972). The difficult issue presented by this case is whether the territorial, location and customer restrictions, as well as the alleged group boycott and price stabilization, were imposed within the Amana distribution chain as vertical restraints, originating as unilateral action from the manufacturer Amana, or whether they operated as horizontal restraints, originating from agreement or concerted action among distributors or retailers.

The Supreme Court has recognized that a manufacturer has an interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of its products. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 56, 97 S.Ct. 2549, 2560, 53 L.Ed.2d 568 (1977). Thus, in determining whether non-price restraints are imposed vertically or horizontally—i.e. whether the non-price restraints should be analyzed under rule of reason or as illegal per se—the focus of inquiry must be upon the effect and purpose of such restrictions. Indeed, the Supreme Court states that in determining whether non-price restraints should be analyzed under a per se rule:

> Our inquiry must focus on whether the effect and, here because it tends to show effect, *see United States* v. *United States Gypsum Co.*, 438 U.S. 422, 436 n.13, 98 S.Ct. 2864, 2873 n.13, 51 L.Ed.2d 854 (1978), the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead are designed to "increase economic efficiency and render markets more, rather than less, competitive. *Id.* at 441, n.16 [98 S.Ct. at 2875 n.16]."

Broadcast Music, Inc. v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20, 99 S.Ct. 1551, 1562, 60 L.Ed.2d 1 (1979). A determination of the source of the restraints imposed and whether such restraints are consistent with the manufacturer's market strategy will expose the purpose of such res-

traints. *Com-Tel, Inc.* v. *Dukane Corp.*, 669 F.2d 404, 410-411 (6th Cir. 1982); see also, *A. H. Cox & Co.* v. *Star Machinery Co.*, 653 F.2d 1302, 1307 (9th Cir. 1981); *Red Diamond Supply, Inc.* v. *Liquid Carbonic Corp.*, 637 F.2d 1001, 1004 (5th Cir.), *cert. denied*, ___ U.S. ___, 102 S.Ct. 119, 70 L.Ed.2d 102 (1981).[10]

IV.

The district court dismissed SMC's per se claims of group boycott, price stabilization and horizontal market divisions via summary judgment on the basis that SMC did not demonstrate the existence of horizontal concerted action—concerted action by competitors of SMC. Summary judgments are somewhat disfavored in antitrust cases, especially when motive or intent is at issue. *See Poller* v. *Columbia Broadcasting Sys.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). The evidence must be viewed in a light most favorable to the nonmoving party, giving that party the benefit of all reasonable inferences. Only if the evidence is not disputed as to any material fact should the case be decided as a matter of law rather than submitted to the jury. *Smith* v. *Hudson*, 600 F.2d 60 (6th Cir. 1979), *cert. dismissed*, 444 U.S. 986, 100 S.Ct. 495, 62 L.Ed.2d 415 (1979). However, the absence of any relevant probative evidence in support of a litigant's antitrust claims will expose such claims to summary judgment disposition.

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[10] The reason for focusing on the source of the restraint is to determine the purpose of the restraint. A restraint imposed by distributors is generally for the purpose of restricting supply or price competition, *Red Diamond Supply, Inc.* v. *Liquid Carbonic Corp.*, 637 F.2d 1001, 1004 n.4 (5th Cir.), *cert. denied*, ___ U.S. ___, 102 S.Ct. 119, 70 L.Ed.2d 102 (1981), whereas restraints imposed intrabrand by a manufacturer may be imposed for the purpose of competing more effectively in the interbrand market, *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 54-55, 97 S.Ct. 2549, 2559-2560, 53 L.Ed.2d 568 (1977).

Restraints imposed vertically, through the market position of a manufacturer or supplier, requires standard analysis under the rule of reason. Departure from this standard analysis must be based upon demonstrable economic effect and a showing that the vertical restrictions have or are likely to have a pernicious effect on competition or that they lack any redeeming virtue. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 58-59, 97 S.Ct. 2549, 2561-2562, 53 L.Ed.2d 568 (1977). Consequently, summary judgment in this case was improper only if the evidence, viewed in a light most favorable to SMC, demonstrates that the restrictions imposed facially appear to always or almost always tend to restrict competition and decrease output. If, however, the evidence supports a finding that the restrictions were designed and imposd by Amana to increase Amana's economic efficiency and thereby render markets more competitive, then summary judgment was properly granted.

A.

In asserting that the district court erred in granting summary judgment in favor of Amana and D-W with regard to its group boycott claim, SMC contends that this case is governed by and is indistinguishable from *United States* v. *General Motors Corp.*, 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966). SMC contends that Amana and its distributors engaged in a joint effort to prevent it and other discount houses from obtaining a supply of microwave ovens and to cut off any supply obtained.

In *General Motors*, three associations of Chevrolet dealers as well as GM participated in a group boycott to eliminate sales of new Chevrolets through discount houses and referral services. The Chevrolet dealers formed associations and complained to GM about sales to discounters, embarked on a letter writing campaign to enlist GM's aid, agreed with GM not to deal with discounters, formed an association to police the agreements between GM and the Chevrolet dealers, and the association supplied GM information for use in bringing way-

ward dealers into compliance. The Supreme Court held that an illegal group boycott existed between the associations of Chevrolet dealers and GM. The Court stated:

> Neither individual dealers nor the associations acted independently or separately. The dealers collaborated through the associations and otherwise, among themselves and with General Motors, both to enlist the aid of General Motors and to enforce dealers' promises to forsake the discounters.
>
> . . .
>
> Nor did General Motors confine its activities to the contractual boundaries of its relationships with individual dealers . . . . The evidence indicates that [GM] had no intention of acting in this unilateral fashion. On the contrary, overriding corporate policy with respect to proper dealer relations dissuaded General Motors from engaging in this sort of wholly unilateral conduct, the validity of which under the antitrust laws was assumed, without being decided, in [*United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960)].

Id. at 143-144, 86 S.Ct. at 1329-1330 (footnotes omitted).

The Supreme Court found concerted action to create an illegal group boycott based on two dispositive factors. First, GM acted in concert with its dealers *for their benefit* rather than to enforce a location clause by unilateral action. *See id.* at 149 (Harlan, J., concurring in result). Had GM taken unilateral action to strengthen and enforce its own marketing strategy through its dealers, an illegal group boycott would not have existed. Second, the dealers and associations did not act independently or separately but rather banded together among themselves and with GM in order to eliminate discounters and competitors. Toward this purpose the dealers and associations as a group demanded GM to impose and enforce location restrictions.

In the present case, the district court found that SMC failed to show that the distributors or dealers demanded the restrictions from Amana. The lower court held that prior to January 1, 1978, only D-W was requested to sell to SMC and D-W's sole

complaint regarding SMC's price competition was not sufficient to find a demand for a group boycott. The court further held that complaints by other dealers and distributors were also insufficient to support a group boycott theory.

Reviewing the facts of this case, we agree with the conclusion of the district court. SMC did not attempt to retail Amana's full product and there is no evidence in the record that any of the distributors or dealers by concerted action among themselves and with Amana refused to deal with SMC. There is insufficient evidence that a conspiracy or concerted action existed to support a variation from the general rule that non-price vertical restraints should be analyzed under the rule of reason.

The fact that distributors and dealers complained to Amana concerning SMC's pricing of Amana ovens does not, without more, balloon this case into an illegal boycott. Dealer initiated contact or actively sought change does not establish that a manufacturer did not ultimately impose restrictions based on its independent business judgment. *A. H. Cox & Co.* v. *Star Machinery Co.*, 653 F.2d 1302, 1307 (9th Cir. 1980). *Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105 (3rd Cir. 1980), *cert. denied*, 451 U.S. 911, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981). There is no evidence that would establish dealer coercion causing Amana to act otherwise than consistent with its market strategy. SMC has not submitted any evidence that Amana's distributors or dealers acted jointly.[11] Complaints to Amana by its distributors and dealers concerning SMC's low prices and lack of services does not establish a causal relationship between such complaints and Amana's imposed restrictions. For

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[11] We recognize that the district court's factual finding, that except for the refusal by D-W all refusals to sell to SMC occurred after January 1, 1978, was clearly erroneous especially in viewing the evidence in a light most favorable to SMC. The record indicates that several refusals to sell occurred in the summer of 1977. However, we find this error to be harmless.

example, SMC strongly asserts that a New Orleans distributor refused to sell at Amana's request. Such evidence in no way establishes a unity of purpose or common design among distributors and dealers on a horizontal level.

Amana's actions of control over its distribution chain were consistent with its market strategy and there is no evidence that Amana acted contrary to its market strategy for the benefit of its distributors or dealers. Thus, given the facts that no evidence exists to find that distributors and dealers joined together in unity of action to exclude SMC and that no evidence exists to find that Amana acted other than in its own economic interest, a finding of a horizontal group boycott cannot be supported. *Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105 (3rd Cir. 1980), *cert. denied*, 451 U.S. 911, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981).

Further, at the time that SMC attempted to purchase 600 radaranges from D-W of a particular type, D-W's refusal to sell was a refusal consistent with the need to prevent free riders. It is obvious that had the sale been made to SMC, the full Amana line of radaranges would not have been represented in SMC's catalog showroom. Further, many of the pre-sale and point-of-sale services would not have been offered.

There exists no evidence that SMC was attempting to enter Amana's distribution chain on a basis consistent with Amana's marketing strategy. SMC contends that some services that Amana requires were offered by SMC for other products. However, at no time did SMC offer to D-W or Amana or any other Amana distributor that it would carry a full line of Amana ovens and offer the same services that Amana distributors and dealers offered.

SMC was attempting to enter the Amana distribution chain in accordance with its own marketing strategy rather than the marketing strategy that Amana imposed upon its distributors and dealers. SMC was attempting to market one model of Amana's countertop microwave ovens at a low price without any accompanying services. Amana and its authorized dis-

tributors and dealers, however, were marketing a different product. They marketed the sale of Amana ovens on the basis of price plus consumer services. Absent evidence that SMC attempted and was prevented from marketing this Amana product, SMC cannot establish an illegal group boycott. In this case, SMC did not attempt to market the Amana product.

In *Com-Tel, Inc.* v. *Dukane Corp.*, 669 F.2d 404 (6th Cir. 1982), this Court found that the considerations in *Sylvania* which required the application of the rule of reason, were that the restrictions were imposed on the entire distribution system by the manufacturer to combat the free rider problem. The restrictions thereby avoided the presumption of illegality because "they had the potential to strengthen the entire distribution chain for Sylvania products and promote the ability of Sylvania products to compete with other television brands." *Id.* at 410. This Court distinguished *Dukane* on the basis that "Dukane did not adopt a general marketing policy to restrict its distributors to certain sales territories and did not, as did Sylvania, restrict distributors to certain locations." *Id.* at 410-411. Thus, the restrictions imposed in *Dukane* were not consistent with Dukane's market strategy. In the present case, SMC has failed to demonstrate that Amana's restrictions were inconsistent with its general marketing strategy. Indeed, the record indicates that the imposed restrictions were the anchor for its whole marketing strategy. The vertical restrictions necessarily reduced interbrand competition, but they also had the potential to promote interbrand competition via efficiencies in the distribution of the Amana product. *Oreck* v. *Whirlpool Corp.*, 579 F.2d 126 (2d Cir. 1978) (en banc), *cert. denied*, 439 U.S. 946, 99 S.Ct. 340, 58 L.Ed.2d 338 (1978), *aff'd* 639 F.2d 75 (2nd Cir. 1980), *cert. denied*, ____ U.S. ____, 102 S.Ct. 639, 70 L.Ed.2d 618 (1981).

From the very start of Amana's marketing its countertop microwave ovens, or at least since 1975, Amana required of its distributors and authorized dealers that they provide an acceptable level of required pre-sale, point-of-sale and post-sale services. Consistent with this marketing strategy was

Amana's need to eliminate any free riders from its distribution chain. The restrictions were imposed to increase interbrand competition within the microwave oven industry.[12]

In *Sylvania, supra*, the Court refused to impose a per se rule on vertical restraints that displayed a potential for increased interbrand competition. *Cf. United States* v. *Koppers Co., Inc.*, 652 F.2d 290, 296, (2d Cir.), *cert. denied*, ____ U.S. ____, 102 S.Ct. 639, 70 L.Ed.2d 618 (1981); *See also, Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979).[13] Given

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[12] In *Continental T.V., Inc.* v. *GTE Sylvania, Inc., supra*, at 55, 97 S.Ct. at 2560, the Court stated that, "[e]stablished manufacturers can use [restrictions] to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. Service and repair are vital for many products, such as automobiles and major household appliances. The availability and quality of such services affect a manufacturers' goodwill and the competitiveness of his product. Because of market imperfections such as the so-called "free rider" effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did."

[13] In *Cernuto* the court stated in reversing a summary judgment disposition:

> Given the alleged anticompetitive and arguably horizontal impact of United's decision, and given the price orientation of the alleged conspiracy, we cannot say that a per se violation of the Act may not be shown. . . . Of course, at trial the defendants may be able to demonstrate that the evidence does not at all conform to what the plaintiff has alleged. If it could be shown, for example, that United's decision to terminate Cernuto was in fact its own—the result of its own marketing strategy and judgment—then notwithstanding Famous' actions, the alleged conduct would be essentially unilateral in nature and might be found to possess the procompetitive redeeming virtues that would defeat the application of a per se rule. Similarly, if defendants can demonstrate that their actions were not motivated *solely* by consideraton of price then the use of a per se rule might be inappropriate.

Id. at 170 (emphasis added). In the present case Amana does demonstrate that its actions in imposing restrictions were not solely moti-

Amana's demonstration of the need to eliminate the free rider problem within its chain of distribution in order to be more efficient and thereby more competitive, as well as the lack of evidence to support a finding that Amana imposed restrictions due to the demands and coercion of its distributors or dealers, we agree with the district court that Amana's vertical restraints are not the kind that facially appear to be the type that would always, or almost always, tend to restrict competition. Amana's demonstration of potential pro-competitive effects is clear and any demonstration that Amana's actions were the result of horizontal concerted action is lacking.

B.

SMC also asserts that the district court erred in granting Amana and D-W's motion for summary judgment dismissing its claims of per se illegal horizontal market divisions and price stabilization. For the same reasons that are applicable to SMC's group boycott claim we agree with the district court that these claims also must be analyzed under the rule of reason. We agree with the district court that there is no evidence of agreements between distributors or dealers to allocate markets. *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972). Further, there is no evidence to support a finding of concerted action between Amana and its distributors or dealers for the purpose or with the effect of stabilizing the price of Amana microwave radarange ovens. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). Amana's restrictions do not interfere with the setting of price by market forces but do require its distributors and dealers to sell the same product.

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vated by consideration of price. Amana demonstrates that in order to market its product plus services so that it can present a more competitive product interbrand, free riders must be eliminated intrabrand.

Although the parties do not label this case as involving a dual distributorship, SMC does point out that Amana is represented at the manufacturing level and at the distributorship level.[14] Several cases, however, dealing with the dual distributorship situation apply the same analysis applied above to determine whether restrictions imposed by a dual distributor should be analyzed under a per se rule. *Krehl* v. *Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348 (9th Cir. 1982); *Copy-Data Sys., Inc.* v. *Toshiba America, Inc.*, 663 F.2d 405 (2d Cir. 1981); *United States* v. *Koppers Co., Inc.*, 652 F.2d 290 (2nd Cir.), *cert. denied*, ___ U.S. ___, 102 S.Ct. 639, 70 L.Ed.2d 618 (1981); *Abadir & Co.* v. *First Mississippi Corp.*, 651 F.2d 422 (5th Cir. 1981); *Red Diamond Supply, Inc.* v. *Liquid Carbonic Corp.*, 637 F.2d 1001 (5th Cir.), *cert. denied*, ___ U.S. ___, 102 S.Ct. 119, 70 L.Ed.2d 119 (1981).

In the present case, several potential economic advantages are legitimately advanced by Amana for imposing horizontal market divisions: attracting aggressive retailers, inducing retailers to engage in promotional activities, creating an efficient market distribution system, and maintaining control over the safety and quality of the product. In *Abadir & Co.* v. *First Mississippi Corp.*, *supra*, the Fifth Circuit states:

> A *per se* rule is applicable to a particular case if and only if the economic analysis which justified the rule applies to the particular case. The *per se* horizontal market-distribution rule would be applicable to the agreement between First Mississippi and Abadir if and only if the economic analysis justifying the *per se* rule applied to the relationship between First Mississippi and Abadir. Because the potential economic advantages which might have motivated First Mississippi are those characteristic of a vertical rather than a horizontal market-distributing agreement, the *per se* horizontal rule does not apply.

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[14] A dual distributorship involves a business structure in which one party operates a branch of dealership on the same market level as one or more of its customers. In this case Amana operated several distributorship stores on the same level as D-W.

Id. at 426. Reviewing the evidence in this case in a light most favorable to SMC, we agree with the district court that Amana's restrictions cannot be characterized as horizontal—facially appearing to be the type of restrictions that would always or almost always tend to restrict competition and decrease output. *Broadcast Music, Inc.* v. *Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 20, 99 S.Ct. 1551, 1562, 60 L.Ed.2d 1 (1979). We find, therefore, that this case was appropriately submitted to the jury under the rule of reason for a determination of whether the restraints imposed increased competition or whether they were such as to suppress or even destroy competition. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed. 568 (1977).

V.

SMC also contends that in submitting this case to the jury the district court erred in instructing the jury under the rule of reason. We do not agree.

The district court instructed the jury concerning the rule of reason in part as follows:

> However, in determing reasonableness there are three crucial inquiries you must make. First, you must determine whether Amana has substantial market power to unreasonably restrain trade in the relevant market. Second, you must determine the effect of the restrictions on competition. Third, you must consider the justifications for imposing the restrictions.

SMC asserts that anticompetitive effect on intrabrand competition alone is sufficient to establish a section 1 violation so that the requirement of substantial market power is not proper. SMC also asserts that the Court's instruction allowed the jury to find an unreasonable restraint and then consider any justifications rather than simply looking to the effect of such restrictions. Finally SMC contends that the district court improperly failed to instruct the jury that the restraints violated section 1 if the purpose of the restraint was to stabilize prices.

Rule of reason analysis requires a showing of anti-competitive market effect by the plaintiff. *Lektro-Vend Corp.* v. *Vendo Co.*, 660 F.2d 255, 268 (7th Cir. 1981); *Borger* v. *Yamaha Int'l Corp.*, 625 F.2d 390, 397 (2d Cir. 1980); *Cowley* v. *Braden Indus., Inc.*, 613 F.2d 751 (9th Cir.), *cert. denied*, 446 U.S. 965, 100 S.Ct. 2942, 64 L.Ed.2d 824 (1980); *Gough* v. *Rossmoor Corp.*, 585 F.2d 381, 386-89 (9th Cir. 1978), *cert. denied*, 440 U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979); *H & B Equip. Co.* v. *Int'l Harvester Co.*, 577 F.2d 239, 246 (5th Cir. 1978). Without market power, a firm cannot have an adverse effect on competition. *Donald E. Rice Tire Co.* v. *Michelin Tire Corp.*, 483 F.Supp. 750, 761 (D.Md.1980), *aff'd*, 638 F.2d 15 (4th Cir.), *cert. denied*. ___ U.S. ___ 102 S.Ct. 324, 70 L.Ed.2d 164 (1981). In *Oreck* v. *Whirlpool Corp.*, 579 F.2d 126 (2d Cir. 1978) (en banc), *cert. denied*, 439 U.S. 946, 99 S.Ct. 340, 58 L.Ed.2d 338 (1979), *aff'd* 639 F.2d 75 (2d Cir. 1980), *cert. denied*, ___ U.S. ___, 102 S.Ct. 639, 70 L.Ed.2d 618 (1981), the court stated:

> In order to prove a violation of § 1 of the Sherman Act, Oreck would have had to show that Whirlpool's agreement with Sears to eliminate Oreck's competition either promoted a Whirlpool monopoly in the vacuum cleaner industry . . . or gave Sears a market position from which it could raise retail prices even in the face of interbrand competition.

Id. at 130 n.5. As pointed out by the court in *Sylvania*, *supra*, rigorous competition among dealers in different brands provides a significant check on the exploitation of the intrabrand market power. *See also, Muenster Butane, Inc.* v. *The Stewart Co.*, 651 F.2d 292, 297 (5th Cir. 1981). The district court, therefore, properly instructed the jury to consider Amana's market power.

Similarly, the district court's instruction regarding justifications for imposing restrictions was not erroneous. In evaluating an agrement's competitive *effect*, the jury must consider "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." *National Soc'y of Profes-*

sional Eng'rs v. *United States*, 435 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978); *Chicago Bd. of Trade* v. *United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 243, 62 L.Ed. 683 (1918).

Finally, we find no merit in SMC's argument that the district court erred in failing to instruct the jury that an unlawful intent to stabilize prices is sufficient to establish a rule of reason violation. The test under the rule of reason of a restraint's reasonableness is whether such restraint has an anticompetitive or procompetitive *effect*.

VI.

SMC also contents that the district court erred in refusing to admit evidence of price differentials prepared by Amana to confirm SMC's own price differential reports received by the court. The price differential report prepared by Amana was obtained by SMC during discovery but was not relied upon by Amana or Amana's expert during the course of trial. Inasmuch as the excluded evidence was cumulative we find that no substantial right was affected and that the district court did not err in excluding it. *Fed.R.Evid.* 403.

VII.

Accordingly, the judgment of the district court is AFFIRMED.

B. Judgment Of The United States Court Of Appeals For The Sixth Circuit

UNITED STATES COURT OF APPEALS,
FOR THE SIXTH CIRCUIT.

No. 81-5057.

DAVIS-WATKINS COMPANY,
Plaintiff-Counter Defendant-Appellee,

and

AMANA REFRIGERATION, INC.,
Counter Defendant-Appellee,

v.

SERVICE MERCHANDISE,
Defendant-Counter Plaintiff-Appellant.

Before MARTIN and CONTIE, Circuit Judges, and TUTTLE, Senior Circuit Judge for the Eleventh Circuit Court of Appeals.

JUDGMENT

APPEAL from the United States District Court for the Middle District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Appellees recover from Appellant the costs on appeal as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

/s/ JOHN P. HEHMAN, Clerk

A True Copy

Attest:

/s/ AUDREY CROCKETT
Deputy Clerk

Issued as Mandate: September 13, 1982

COSTS: TO BE RECOVERED BY APPELLEE (AMANA)

Filing fee ..... $
Printing $783.03

Total ..... $

C. Opinion Of The United States District Court For the Middle District Of Tennessee

UNITED STATES DISTRICT COURT,
M. D. TENNESSE, NASHVILLE DIVISION.

No. 77-3279.

DAVIS-WATKINS COMPANY, *Plaintiff*,

v.

SERVICE MERCHANDISE COMPANY, INC.,
Defendant and Counter-plaintiff,

v.

DAVIS-WATKINS COMPANY and
Amana Refrigeration, Inc., Counter-defendants.

Oct. 21, 1980

MEMORANDUM

WISEMAN, District Judge.

This case is before the Court on cross motions for summary judgment by Amana Refrigeration and Service Merchandise Company on the per se antitrust theories. Service Merchandise's request for a jury trial is also before this Court and is addressed in this memorandum.

The original complaint in this lawsuit was filed by Davis-Watkins Company [Davis-Watkins] against Service Merchandise Company [Service Merchandise] for violation of the Robinson-Patman Act, 15 U.S.C. § 13a.[1] The gravamen of the complaint was that Service Merchandise had engaged in predatory pricing of Amana Radarange microwave ovens. Davis-Watkins is the exclusive distributor for Amana products in a sixty-four county area covering southern Kentucky, middle Tennessee, and northern Georgia and Alabama. Service

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[1] Although Davis-Watkins also alleged violations of the Tennessee unfair sales law, Tenn. Code Ann. 69-302-306 pendent jurisdiction was not accepted by this Court. Order of August 10, 1977.

Merchandise filed a counterclaim against Davis-Watkins and Amana Refrigeration alleging violations of the federal antitrust laws. The Robinson-Patman Act claim of Davis-Watkins has been settled.[2] Therefore, the antitrust counterclaim is the sole basis for this lawsuit.

Service Merchandise, a Tennessee corporation, is a retail merchandising firm, which owns and operates over one hundred catalog showrooms in twenty-two states.[3] Sales of a variety of merchandise result from both mail order and direct sales. Service Merchandise is one of the largest catalog showroom merchandisers in the country. Its success is attributable at least in some degree to its no frills approach to marketing.

Amana Refrigeration, Inc., a Delaware corporation, manufactures, among other things, countertop microwave ovens for home use. Amana is undoubtedly a successful firm; its share of the microwave oven market alone approximates twenty percent. Since January 1, 1978, Amana's contracts with its distributors have divided the United States into specific geographical sales territories. The thrust of Service Merchandise's claim against Amana is that the contracts between Amana and its distributors established geographic, customer, and location restrictions that amount to restraints of trade in violation of section 1 of the Sherman Act. Basically, Amana responds that the restrictions are reasonable under the rule of *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977).

Amana distributes its products through sixty-seven wholesale distributors, of which nine are wholly owned branches of Amana, and some 3,500 authorized retail dealers. Each distributor executes a form distributorship agreement with

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[2] Order of October 10, 1980.

[3] Figures taken from the 1979-80 Service Merchandise Catalog. In 1976, Service Merchandise operated fifty-seven showrooms in thirteen states.

Amana. Prior to January 1, 1978, each distributor was assigned a geographical area of primary responsibility for the distribution of Amana's products. No restrictions were placed on the Amana distributor or dealer concerning where or to whom they could resell Amana products. Each distributor was expected, however, to perform satisfactorily its sales and service responsibilities in its respective geographic territory.

In January, 1978, Amana modified its distribution system. Under the 1977 agreement, the distributor had to agree, among other things, "[t]o purchase for resale, on its account, products manufactured or offered for sale by Amana." The 1978 agreement stated that the distributor agreed "[t]o purchase, on its own account, for resale only to authorized Amana dealers located within distributor's authorized territories products manufactured or offered for sale." The distributors were also provided with new dealer contracts, which limited the dealers to sell Amana products only from the locations specified in the contract and limited resale to the end-user customer. These three restrictions, (1) geographic territorial restrictions for distributors, (2) dealer location restrictions, and (3) customer limitations for both distributors and dealers, are the backbone of Amana's distribution system and give rise to the basic complaint of Service Merchandise.

The facts giving rise to this litigation resulted from Service Merchandise's attempts to buy Amana microwave ovens for resale. Service Merchandise wanted the ovens, but almost no one in Amana's distribution chain would sell. In 1976, Service Merchandise attempted to place an order for six hundred Amana microwave ovens with Davis-Watkins. Davis-Watkins refused to fill the order. Service Merchandise obtained a shipment of two hundred Radaranges from W.S. Bruno Company in New York and put the Radaranges on sale in Nashville during December, 1976.[4]

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[4] Davis-Watkins' Robinson-Patman Act claim was based on the sale of these Radaranges. It alleged that Service Merchandise's prices, between $429.97 and $449.97, amounted to illegal price discrimination.

Various Amana distributors and dealers then complained to Amana regarding the Service Merchandise sale. Davis-Watkins was the initial complainant. Service Merchandise had obtained the Radaranges through transshipment from a New York distributor. On October 3, 1977, Amana announced a clarification in its transshiping policy. During 1977 an Amana dealer in Columbia City, Indiana, and a branch manager in Chicago, Illinois, wrote Amana complaining of the Service Merchandise sale. Service Merchandise alleges that these letters and complaints resulted in the clarification and 1978 contractual restrictions. The contractual restrictions, among other things, prevented Amana distributors and dealers from selling microwave ovens to Service Merchandise.

Service Merchandise alleges per se illegality under four different theories: group boycott, horizontal market division, price stabilization, and vertical market division. If these fail Service Merchandise urges that the Amana system be tested under the rule of reason. Amana moved for summary judgment against each of Service Merchandise's per se theories. Service Merchandise responded with a motion for summary judgment on the issue of liability, relying on its rule of reason argument as well as its per se theories. Initially, the Court notes that Service Merchandise is not entitled to summary judgment on its rule of reason theory because a trial on the merits is necessary to determine the reasonableness of Amana's system of distribution. The per se theories, however, are susceptible to summary judgment disposition.

Amana's motion for partial summary judgment is properly before this Court. Summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." F.R.Civ.P. 56(c). When the law is well developed, as it is with regard to Service Merchandise's per se theories, and the products of lengthy discovery are before the Court, summary judgment is particularly appropriate.

This Court holds that Amana is entitled to summary judgment against each of Service Merchandise's per se theories. The instant case challenges nonprice vertical restrictions; in no material way, for the purpose of these motions, it is distinguishable from *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). The case requires a determination of reasonableness and a trial will be held on that issue. Any relevant evidence bearing on the reasonableness or perniciousness of Amana's distribution system will be admitted. No need has been demonstrated, however, to submit frail claims of per se illegality to the trier of fact. To do so would merely serve to confuse and obfuscate the issues.

Section 1 of the Sherman Act makes "[e]very contract, combination . . . or conspiracy, in restraint of trade . . . illegal." 15 U.S.C. § 1. In *Standard Oil Co.* v. *United States*, 221 U.S. 1, 31 S.Ct. 725, 55 L.Ed. 619 (1911), the Supreme Court held that the statute prohibits only *unreasonable* contracts, combinations, or conspiracies in restraint of trade.[5] The courts have fashioned rules of per se illegality, however, for certain practices because of their pernicious effect on competition.

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[5] In a later case, *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918), Justice Brandeis gave a classic description of the rule of reason.

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particularly remedy, the purpose or end sought to be obtained, are all relevant facts.

Id. at 238, 38 S.Ct. at 244, 62 L.Ed. at 687.

> [C]ertain agreements or practices . . . because of their pernicious effect upon competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused with a business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

Northern Pacific Railroad Co. v. *United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545, 549-50 (1958).

Traditionally, group boycotts or concerted refusals to deal are cited as per se illegal restraints. Service Merchandise attempts to characterize the conduct of Amana, its distributors, and its dealers as a concerted boycott. That Davis-Watkins and other distributors refused to deal with Service Merchandise is undisputed. Exclusive distributorships, however, are not boycott agreements. *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207, 212, 79 S.Ct. 705, 709-10, 3 L.Ed.2d 741, 745 (1959). Except for the refusal by Davis-Watkins, all of the refusals to sell to Service Merchandise occurred after January 1, 1978, when Amana's tough territorial, location, and customer restrictions were imposed. The only way Service Merchandise could sustain a group boycott theory is to show that either the distributors or the dealers demanded the restrictions from Amana so that all members of either group would comply with the refusal to sell to Service Merchandise. Such a case cannot be made. Only Davis-Watkins was in any position to make such a demand before the restrictions were handed down, and the incidence of complaints by dealers and distributors is simply insufficient to make out a per se theory of illegality. Reading the pleadings, depositions, and other records on file in the light most favorable to Service Merchandise, the sole complaint by

Davis-Watkins and the letters from dealers and distributors would not allow this Court to find a group boycott.[6]

Over three years ago discovery was commenced in this case. The Court has masses of documents before it. Service Merchandise alleges a group boycott in its pleadings but the record evidence simply does not support that theory. Group boycott is a theory that attaches per se illegality to horizontal concerted actions—concerted action by competitors of Service Merchandise. *Blackburn* v. *Crum & Forster*, 611 F.2d 102, 104 (5th Cir.), *cert. denied*, ___ U.S. ___, 100 S.Ct. 2989, 64 L.Ed.2d 856 (1980); *Gough* v. *Rossmoor Corp.*, 585 F.2d 381, 387 (9th Cir. 1978) 99 S.Ct. 1280, *cert. denied*, 440 U.S. 936, 59 L.Ed.2d 494, (1979); *Oreck Corp.* v. *Whirlpool Corp.*, 579 F.2d 126, 131 (2d Cir.), *cert. denied*, 439 U.S. 946, 99 S.Ct. 340, 58 L.Ed.2d 338 (1978). In *Blackburn* v. *Crum & Forster*, *supra*, the Fifth Circuit affirmed summary judgment against a group boycott theory similar to Service Merchandise's theory in this case. The alleged conspirators were suppliers of insurance and the plaintiff was an insurance broker. The Fifth Circuit correctly held the per se rule inapplicable because the plaintiff was not a competitor of the insurance companies. 611 F.2d at 104.

Moreover, the instant case does not involve the pernicious horizontal arrangements against which the per se rules apply with such force. Service Merchandise's second per se theory of illegality is horizontal market division. In *United States* v. *Topco Associates*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972), the Supreme Court held that division of markets by firms in a horizontal relationship amounted to a per se illegal restraint on competition. The *Topco* defendants were operators of independent grocery stores who were in competition with large grocery store chains. The chains sold items that

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[6] In any event, if at trial, Service Merchandise is able to prove that the *purpose and effect* of the 1978 restrictions was to exclude competition, then it is entitled to a judgment under any antitrust theory.

were nationally advertised, so-called house brands, and this enhanced their competitive strength. The pernicious action by the *Topco* defendants was their creation of a subsidiary for the purpose of labeling and marketing products with the Topco brand. The brand could be advertised like the chain-stores' brands, and the independents' competitive strength would be enhanced. The Supreme Court held, however, that the per se doctrine was the proper rule.[7] The horizontal agreement of the independents was the type of naked restraint for which the per se rules were created. *Id.* at 608-10, 92 S.Ct. at 1134-35, 31 L.Ed.2d at 526-27. *See Northern Pac. Ry.* v. *United States*, 356 U.S. at 5, 78 S.Ct. at 518, 2 L.Ed.2d at 549-50.

The record evidence in this case in no way demonstrates that the territorial, customer, and location restrictions were the result of a horizontal agreement. Nothing in the record, compiled after three years of discovery, shows that joint pressure was exerted by Amana distributors for Amana to implement the restrictions. Evidence of a few complaints by dealers and distributors is present. Mere complaints, however, do not support an inference of per se illegal horizontal market division.

Service Merchandise also urges the following theory as a per se antitrust violation.

> It is the theory of [Service Merchandise's] case that the allocation of sales territories among Amana distributors and independent branches and the enforcement of the customer and location restrictions upon the dealers was part of a scheme to prevent price competition between distributorship areas, both at the wholesale and retail levels, and to thereby stabilize prices within each distributorship area.

Memorandum of Service Merchandise in Opposition to Motion of Amana for Partial Summary Judgment 21.

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[7] *But see United States* v. *Topco Associates, Inc.*, 1973 Trade Reg. Rep. (CCH) ¶ 74,485 (N.D. Ill. 1973).

Service Merchandise concedes that Amana did not engage in resale price maintenance, *id.* at 22, or price fixing, *id.* at 21. Its only theory is that Amana's nonprice restrictions tend to prevent intrabrand competition, and thus enhance price stabilization. This is a theory that must be tested under the rule of reason. When a party does not allege a traditional anticompetitive restraint with which the courts have had considerable experience in evaluating its harmful effects on competition, the Court should not apply a per se rule. *See Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 19 n.33, 99 S.Ct. 1551, 1562 n.33, 60 L.Ed.2d 1, 16 n.33 (1979); *United States* v. *Topco Associates, Inc.*, 405 U.S. at 607-08, 92 S.Ct. at 1133, 31 L.Ed.2d at 525 (per se rule inappropriate until after considerable experience with the type of challenged restraint).

To be sure, the Supreme Court declared in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940), that "a combination formed for the purpose and with the effect of . . . stabilizing the price of a commodity . . . is illegal per se," *id.* at 223, 84 L.Ed. at 1166, 60 S.Ct. at 844. Service Merchandise, however, attempts to include too broad a theory into this rule. What Service Merchandise complains of, in every allegation, are the territorial, customer, and location restrictions. Since *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), it is beyond question that these types of vertical restraints are not the kind of practices that "facially appear[] to be [the type] that would always or almost always tend to restrict competition." *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 19, 99 S.Ct. 1551, 1562, 60 L.Ed.2d 1, 16 (1979). That Service Merchandise alleges a tendency of the vertical restrictions to stabilize price does not move the restriction into the category of naked restraints against which the per se rules apply.

Finally, Service Merchandise alleges that the vertical restrictions themselves are per se illegal. This theory is totally rejected by the Supreme Court's decision in *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, *supra*. In *Sylvania*, plaintiff, retailer, had been a party to a franchise agreement with defend-

ant, manufacturer. The agreement included a location clause, which required the retailer to sell only from the location specified in the agreement. In *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), territorial and customer restrictions placed on the resale of goods by distributors were held per se illegal under the Sherman Act. In *Sylvania*, the Court overruled *Schwinn*, 433 U.S. at 58, 97 S.Ct. at 2562, 53 L.Ed.2d at 585, and held that the vertical location restriction should be judged under the rule of reason.

Subsequent circuit court decisions have held correctly that *Sylvania* is not limited to location clauses. In *General Beverage Sales Co.* v. *East-Side Winery*, 568 F.2d 1147 (7th Cir. 1978), the court held that *Sylvania* applied to vertical territorial restrictions, *id.* at 1153-54. Clearly, the correct rule in a case challenging vertical restrictions is the rule of reason. *See Daniels* v. *All Steel Equip., Inc.*, 590 F.2d 111 (5th Cir. 1979); *Oreck Corp.* v. *Whirlpool Corp.*, 579 F.2d 126 (2d Cir.), *cert. denied*, 439 U.S. 946, 99 S.Ct. 340, 58 L.Ed.2d 338 (1978); *H & B Equip. Co.* v. *International Harvester*, 577 F.2d 239 (5th Cir. 1978); *National Auto Brokers Corp.* v. *GM Corp.*, 572 F.2d 953 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072, 99 S.Ct. 844, 59 L.Ed.2d 38 (1979); *Eastern Scientific Co.* v. *Wild Heerbrugg Instruments, Inc.*, 572 F.2d 883 (1st Cir.), *cert. denied*, 439 U.S. 833, 99 S.Ct. 112, 58 L.Ed.2d 128 (1978); *General Beverage Sales Co.* v. *East-Side Winery*, 568 F.2d 1147 (7th Cir. 1978); *Lamp Liquors, Inc.* v. *Adolph Coors Co.*, 563 F.2d 425 (10th Cir. 1977) (cases following *Sylvania* and applying the rule of reason).

JURY TRIAL REQUEST

Service Merchandise did not demand a jury in its initial responsive pleading. Fourteen months after its counterclaim was filed, Service Merchandise filed leave to amend its counterclaim and demanded a jury trial. This Court granted leave to amend, but reserved ruling on the jury demand. Amana opposed the jury request on the ground that since Service

Merchandise had raised no new issues in its amended counterclaim, it was not entitled to a jury trial as of right. According to Amana, the Court in its discretion should deny the jury request under Federal Rule of Civil Procedure 39(b) because of the complexity of this case. In any event, Amana argues, the issues in the instant case are so complex that to grant Service Merchandise a jury trial would violate Amana's due process rights. *See In re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069 (3d Cir. 1980). Service Merchandise urges, however, that it cannot be deprived of its seventh amendment right to trial by a jury.

The seventh amendment provides that "the right to trial by a jury shall be preserved." U.S.Const. amend. VII. Limits on the preservation of this right are imposed by Rule 38 of the Federal Rules of Civil Procedure: "Any party may demand a trial by a jury . . . not later than ten days after the service of the last pleading directed to [an issue triable of right by a jury]." F.R.Civ.P. 38(b). Failure to make a timely demand constitutes a waiver of a party's right to jury trial. F.R.Civ.P. 38(d). That parties may inadvertently waive their seventh amendment right to a jury trial is well settled. *See* 9 Wright & Miller, Federal Practice and Procedure § 2321 (1971) (citing cases). The court, exercising its discretion, may grant relief from the waiver.[8] The courts should grant a jury trial in the absence of strong and compelling reasons to the contrary. *Bush* v. *Allstate Ins. Co.*, 425 F.2d 393, 396 (5th Cir.), *cert. denied*, 400 U.S. 833, 27 L.Ed.2d 64, 91 S.Ct. 64 (1970); *Swofford* v. *B & W, Inc.*, 336 F.2d 406, 409 (5th Cir. 1964), *cert. denied*, 379 U.S. 962, 13 L.Ed.2d 557, 85 S.Ct. 653 (1965); *Davis* v. *Elkins*, 69 F.R.D. 705, 706 (E.D.Tenn. 1975).

The complexity of a case may justify the refusal to grant a discretionary jury trial motion. In *Rutledge* v. *Electric Hose*

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[8] Federal Rule of Civil Procedure 39(b) provides that "the court in its discretion upon motion may order a trial by a jury of any or all issues."

and Rubber Company, 511 F.2d 668 (9th Cir. 1975), an antitrust plaintiff failed to make a timely jury demand. On appeal the Ninth Circuit held that:

> In our weighing of the nature and totality of all circumstances of the case, the complexity of expected jury questions, and the public interest generally, we cannot say that the denial of a jury trial under the provisions of Rule 39(b) was an abuse of judicial discretion.

Id. at 675 (citing 9 Wright & Miller, Federal Practice & Procedure § 2334 n.49 (1971)). Therefore, this Court could refuse to allow a jury trial without reaching the due process versus seventh amendment issue, which was confronted by the Third Circuit in the *Japanese Electronic Products* case. The Court is of the opinion, however, that this is an appropriate case for a jury. After the parties' settlement of the Robinson-Patman Act claims and this Court's grant of summary judgment against Service Merchandise's per se claims, one basic issue remains: whether Amana's system of distribution is unreasonable under the antitrust laws. This issue is not too complex for a jury of laymen to decide.

Unfortunately, no litmus-paper test exists to determine complexity. The issue is whether the case is so complex that a jury cannot make a rational decision based on the evidence adduced at trial. In the *Japanese Electronic Products* case, Judge Seitz enunciated three factors for the district court to weigh when determining complexity.

> [F]irst, the overall size of the suit, the primary indicia of which are the estimated length of trial, the amount of evidence to be introduced and the number of issues that will require individual consideration; second, the conceptual difficulties in the legal issues and the factual predicates to these issues, which are likely to be reflected in the amount of expert testimony to be submitted and the probable length and detail of jury instructions; and third, the difficulty of segregating distinct aspects of the case, as indicated by the number of separately disputed issues related to single transactions or items of proof.

Id. 631 F.2d at 1088.

The estimated length of trial of the instant suit is six weeks. Although this is longer than the average case tried in the Middle District of Tennessee, it is not so long as to expect lapses of memory. This Court has cleared its docket for the trial of the case and anticipates very few interruptions.[9]

Undoubtedly, the amount of evidence to be introduced is massive. Amana's entire system of distributing and promoting Radaranges must be examined. The evidence, no matter how great an amount, will focus on one central issue: the reasonableness of Amana's vertical restrictions. Because the number of legal issues that will require individual consideration has been reduced from six (the Robinson-Patman Act theory, the four per se theories, and the rule of reason theory) to one, the amount of evidence does not, in and of itself, complicate the case beyond a jury's comprehension.

The amount of expert testimony to be introduced at trial is not readily ascertainable. In the parties' list of witnesses who may be called at trial, four of the seventy-four persons listed are experts.[10] The opinion of this Court is that the expert testimony in this case will help clarify the conceptual difficulties rather than obfuscate the issues.

The jury instructions in this case will be lengthy. The jury instructions in every rule of reason case challenging the vertical restrictions of a national manufacturing firm require lengthy jury instructions. Every such case, however, is not too complex for a jury. Therefore, lengthy jury instructions alone will not require a finding of complexity in this case.

The Court will assist the attorneys in segregating distinct aspects of the case. Discovery has proceeded in this case for

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[9] Trial is scheduled from 8:30 to 1:00 so that sentencings and speedy trial cases may be heard without interrupting the instant case.

[10] Service Merchandise lists fifty-three witnesses of whom two appear to be experts. Amana lists forty-four witnesses, three of whom are designated as experts. Both parties name one of the same expert and nineteen of the same nonexpert witnesses.

over three years. The attorneys should be well prepared for trial. The Court perceives few problems in separating the distinct aspects of the case.

Moreover, any determination of complexity must consider the effect that a finding of complexity in this case will have on other cases. Although this is a large case with respect to what is at stake, and although rule of reason cases generally require sophisticated economic evidence for the purpose of focusing on alleged harm to competition, this Court is reluctant to find sufficient complexity to remove the case from the jury. The civil jury trial was provided for in the Bill of Rights to the United States Constitution and has been a hallmark of the English and American system of justice for centuries. A discretionary request for a jury trial should not be denied unless compelling reasons support the denial. The rationale for denying a jury in this case is simply not compelling. Because of this Court's basic reluctance to deny a jury trial, and because this case involves only one claim for relief, the antitrust rule of reason claim, Service Merchandise's request for a jury is granted.

D. Order Of The United States District Court For The Middle District Of Tennessee

IN THE UNITED STATES DISTRICT COURT,
FOR THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION.

No. 77-3279.

DAVIS-WATKINS COMPANY, *Plaintiff,*

v.

SERVICE MERCHANDISE COMPANY, INC.,
Defendant and Counter-plaintiff,

v.

DAVIS-WATKINS COMPANY and
AMANA REFRIGERATION, INC.,
Counter-defendants.

ORDER

In accordance with the accompanying memorandum, it is ORDERED that Amana Refrigeration, Inc.'s motion for partial summary judgment is granted, Service Merchandise Company, Inc.'s motion for partial summary judgment is denied, and Service Merchandise Company, Inc.'s request for a jury trial is granted.

/s/ THOMAS A. WISEMAN, JR.
Thomas A. Wiseman, Jr.
United States District Judge

E. Judgment Of The United States District Court For The Middle District Of Tennessee

UNITED STATES DISTRICT COURT,
FOR THE MIDDLE DISTRICT OF TENNESSE,
NASHVILLE DIVISION.

Civil Action File No. 77-3279

SERVICE MERCHANDISE COMPANY, INC.,

v.

DAVIS-WATKINS COMPANY and
AMANA REFRIGERATION, INC.,

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Thomas A. Wiseman, Jr., United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is Ordered and Adjudged that upon the jury's verdict for the defendants, the plaintiff's case is dismissed.

Thereupon the jury was polled and each juror affirmed the verdict as being his or her individual verdict.

FILED
Dec. 17, 1980
JULIA B. CROSS
CLERK

/s/ MARY CONNER
Deputy Clerk

Dated at Nashville, Tennessee, this 17th day of December, 1980.

/s/ JOYCE J. MERRITT
Clerk of Court
Courtroom Deputy

Issued as Mandate: September 13, 1982

III. EXCERPTS OF TESTIMONY FROM THE RECORD BELOW

TESTIMONY OF RAYMOND ZIMMERMAN

Q. Mr. Zimmerman —

A. Yes, sir.

Q. Where do you live?

A. 6004 Durham Springs, Nashville, Tennessee.

Q. How long have you lived in Nashville?

A. 35 years.

Q. What is your occupation, sir?

A. President of Service Merchandise Company.

Q. How long have you held that position?

A. Seven years.

Q. What is the nature of the business of Service Merchandise?

A. Service Merchandise Company is a catalog showroom.

Q. A retail merchandiser?

A. Yes, sir.

Q. How long have you been engaged in retail merchandising?

A. 39 years.

* * * *

Q. Have any of your suppliers provided personnel for the floor in connection with your selling?

A. Yes, sir. Several vendors provide what we call demonstrators that work on our floor to sell their product and/or really any product in the area.

Q. Can you name any products for which you have been provided such persons?

A. Hoover has sales demonstrators, I believe — I don't know if they currently do; I know in the past they've had them — GE, Sunbeam, Oster, Eureka, Panasonic. A lot of

the major vendors furnish us some sort of assistance on the sales floor in selling their product.

Q. Who pays those people?

A. Well, it's either the vendor pays them or we pay them and the vendor rebates the money to us.

Q. But essentially their salaries are paid by the supplier?

A. Yes, sir.

TESTIMONY OF EVERETT PURDY

Q. Mr. Purdy, would you tell the jury where you live and where you work.

A. I live in Hermitage, Tennessee. I work at the Service Merchandise Company.

Q. How long have you been employed by Service Merchandise?

A. Eight years this coming February.

Q. What is your present position there?

A. Senior vice-president of merchandising.

Q. Before your employment with Service Merchandise had you had any experience in retail merchandising?

A. Approximately 14 years prior to that.

* * * *

Q. Mr. Purdy, turning now to Service Merchandise's mode of selling, we have heard testimony that in some departments there are salespeople on the floors of the showrooms. Would you mind telling us again in what departments there are salespeople?

A. Salespeople are employed in our jewelry department, our Sight and Sound, which is cameras and electronics, your sporting goods, and I believe that's it.

Q. Do those people have any training?

A. Any formal training?

Q. Any training.

A. Yes, they do. We provide a training manual for these particular areas for showrooms that we're talking about, and in the — we have had training seminars sponsored by

some of the manufacturers' representatives. There is a manual and a work book out for the Sight and Sound department. Jewelry people are trained, I am — if I'm not mistaken, they have a similar type of training manual available to them also, and meetings and seminars conducted at the showroom level.

* * * *

Q. Mr. Purdy, if the staff at Service Merchandise decided it was necessary or appropriate to have a similar training manual for salespeople selling microwave ovens, does Service Merchandise have the capability of preparing that type of training book and providing that type of training?

A. Absolutely.

* * * *

Q. I will hand Plaintiff's Exhibit 79 for identification to the Marshal — on this, I have sufficient copies to be handed to the jury, but I will first ask that the witness identify it, the exhibit. Mr. Purdy, what is Plaintiff's Exhibit 79 for identification?

A. This is a Sight and Sound department Product Knowledge Work Book.

Q. Was that prepared by Service Merchandise?

A. Yes, it was.

Q. Do you have the capability within your organization to produce this sort of thing with respect to other products?

A. Oh, absolutely. No problem there.

Q. Have you been requested by any supplier of microwave ovens to work up this sort of training with respect to selling microwave ovens?

A. No, we have not.

* * * *

Q. Do you know if S-M, Service Merchandise, is authorized by any supplier of microwave ovens to provide service for their ovens?

A. Yes, we are. We are authorized by Tappan to perform in-house service. We have been given verbal okays

by three other manufacturers and are waiting for them — we have to submit a list — serial numbers of equipment we use, and then they will authorize us.

* * * *

Q. You have mentioned, Mr. Purdy, making a first contact with a distributor in 1976, I believe you said sometime in June 1976, for possible purchase of the Amana Radarange.

A. That's correct.

Q. Who made that contact?

A. I did.

Q. Who did you call?

A. A gentleman — Mr. Watkins at Davis-Watkins here in town, which is the — was the local Amana distributor.

Q. Can you describe that conversation as best as you can recall?

A. Well, I asked Jim whether he would — told him we were quite interested in buying his product and would he consider selling us. And at that point, it was a rather brief conversation, he said that he could not sell us. I believe that was pretty much the gist of that conversation.

Q. Did you contact him again at any time?

A. Yes, I did. I believe it was, I'm going to say the early part, perhaps, of November of that same year, at which time I approached him again and told him that I felt that definitely Amana was an item — Amana Microwaves was a category we should consider and that we would appreciate the opportunity to sit down and talk with him and discuss our purchasing the product from him. I believe at the time I told him I needed 600 ovens, or a quantity such as that.

Q. Anything else said?

A. Well, he paused — he did ask me at the time what I intended to sell them for. And I said "For less than full retail."

At that point, he told me, he says, "Sorry, I just can't sell you." That was the end of that conversation.

* * * *

TESTIMONY OF EDWARD JEFFREY

Q. Will you state your full name and address?

A. Edward Jeffrey. Number 40 River Ridge, Little Rock, Arkansas.

Q. How are you employed?

A. Self-employed.

Q. What business are you in?

A. Primarily in the distribution of appliances wholesale.

Q. When you were an Amana distributor, what was your assigned territory?

A. Basically all of Arkansas with the exception of about 13 counties to the Eastern part of Arkansas that bordered along Memphis.

Q. Were you the only Amana distributor within this market?

A. Yes.

* * * *

Q. Okay one last question. You testified at first that you felt that you had received an implied threat from Amana that you would be terminated if you sold to Service Merchandise and you later testified that that was just an assumption, that you didn't have any facts. When we are talking about facts, we're including something that someone told you orally, somebody from Amana who may have orally—

A. I was told by their regional people that penalties would be severe for selling people such as Service Merchandise.

* * * *

TESTIMONY OF LOUIS L. DAVIS

* * * *

Question: Mr. Davis is the President of the plaintiff, and, as such, he is familiar with the distribution methods of the Amana Radarange Oven.

A. That's right.

Q. Did you have a meeting or a get-together with your various licensees sometime during the past winter where the topic of Service Merchandise selling these items came up?

A. Yes, sir.

Q. When was that?

A. Sometime in January.

Q. What was the occasion for the get-together?

A. Simply to talk to them face to face about the situation and simply tell them what we knew about it.

Q. In other words, the purpose of the get-together was merely to discuss the Service Merchandise situation?

A. Well, that among a sales program that we had for that period, too. We, from time to time have the dealers in Nashville get together—and in Chattanooga—for a luncheon and present new programs and merchandising activities to them.

Q. What did you tell the dealers that you were going to do?

A. We told them at the time we didn't know what we could do. We listened more to them, and at the time we did not know of any action or counteraction, other than we would endeavor to try to stop some way the pricing and the competition that they were experiencing from Service Merchandise, but we had no way, no direction to tell them other than that this is all we knew.

Q. You did not indicate to them that you were taking or going to take steps to see if you could not stop the situation?

A. We told them we were investigating what the alternatives were toward stopping the situation.

Q. What did you do?

A. Well, basically, we tried to prevail upon Amana to help us stop the transshipping, and from my past experience with the situation, that's about all we could do, is to ask their help in stopping the transshipping.

* * * *

Supreme Court, U.S.
FILED
DEC 30 1982
ALEXANDER L. STEVAS
CLERK

No. 82-848

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

SERVICE MERCHANDISE COMPANY, INC.
Petitioner,

v.

AMANA REFRIGERATION, INC. and DAVIS-WATKINS COMPANY
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-848

SERVICE MERCHANDISE COMPANY, INC.
Petitioner,

v.

AMANA REFRIGERATION, INC. and DAVIS-WATKINS COMPANY
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit.

SUPPLEMENTAL BRIEF FOR PETITIONER

On December 7, 1982, Monsanto Company petitioned for certiorari in No. 82-914, seeking review of the Seventh Circuit's recent decision in *Spray-Rite Service Corporation* v. *Monsanto Company*, 684 F.2d 1226 (7th Cir. 1982). The filing of that petition strengthens and supports even further the grounds on which we relied, on November 19, 1982, in petitioning for certiorari in the present *Service Merchandise* case, No. 82-848. We therefore file this Supplemental Brief under Rule 22.6 of the Rules of this Court to call the Court's attention to the relationship between these two pending petitions filed less than three weeks apart.

A. The Seventh Circuit's Decision And The Recent Filing Of A Petition For Certiorari From That Decision.

In affirming the antitrust damage award against Monsanto, the *Spray-Rite* decision (684 F.2d 1226) flatly holds that a group boycott is *per se* unlawful and violates section 1 of the Sherman Act (15 U.S.C. § 1) where the manufacturer "agrees with some of its distributors to terminate [or simply refuse to renew the target's] distributorship or limit [the target's] access" to the manufacturer's products (684 F.2d at 1235). *Spray-Rite* further holds that proof of a dealer's complaints to the manufacturer about a competitor dealer's price-cutting and the manufacturer's termination of the price-cutting dealer in response to those complaints "is sufficient to support an inference of concerted action" (684 F.2d at 1238). Indeed, in the *Service Merchandise* case there is substantial direct evidence of concerted conspiratorial conduct. Petition at 20-21. There is no need to employ an inference.

The dispositive—and, in our view, entirely correct—holdings by the Seventh Circuit directly conflict with the refusal of the Sixth Circuit in *Service Merchandise* to allow a properly instructed jury to apply the same *per se* liability rule to identical anti-competitive and concerted activity between Amana and its distributors and dealers. Thus, *Spray-Rite* is still an additional court of appeals decision buttressing our earlier assertion in the *Service Merchandise* petition for certiorari that the Sixth Circuit's holding (in *Service Merchandise*) creates a conflict among the circuits in the interpretation of *Sylvania*.[1] Petition at 18. As already noted, on December 7, 1982, Monsanto filed a certiorari petition (No. 82-914, Oct. T.,

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[1] Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

1982), challenging the Seventh Circuit's above-described holdings in *Spray-Rite*.

B. The Sixth Circuit's Holding Conflicts Not Only With The Third Circuit's Decision In *Cernuto* But With The Seventh Circuit's Decision In *Spray-Rite* As Well.

Our pending petition for certiorari in *Service Merchandise* (No. 82-848) at pages 18-20 relies strongly on *Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979), as to the need for applying the *per se* rule and not the rule of reason. Moreover, "the present [*Service Merchandise*] case cannot be distinguished from *Cernuto* in any material respect." Petition at 20. We also show in our petition that *Cernuto* properly interpreted this Court's *Sylvania* decision and that the Sixth Circuit's *Service Merchandise* decision directly conflicts with *Cernuto* by rejecting the Third Circuit's interpretation of *Sylvania*. Petition at 19-21. In particular, the *Cernuto* decision emphasizes the impropriety of employing summary judgment procedures to deprive a plaintiff of a jury trial on the issue of *per se* liability. 595 F.2d at 165.

The Seventh Circuit's decision in *Spray-Rite* understandably and correctly follows the Third Circuit's *Cernuto* decision (684 F.2d 1234). That is why, of course, *Monsanto's* petition for certiorari (at page 21, note 26) finds it necessary to challenge *Cernuto* as well as *Spray-Rite*. Moreover, the *Monsanto* petition, at pages 23, 25 and 26, urges this Court to follow the incorrect views of the Sixth Circuit in *Service Merchandise*. Those views, of course, are the views we challenge in our pending petition in No. 82-848 as misinterpreting this Court's *Sylvania* decision and as leading the Sixth Circuit into conflict with the *Cernuto* decision.

In sum, the need for granting certiorari in *Service Merchandise* (No. 82-848) is underscored by the additional conflict in the circuits between *Service Merchandise* and *Spray-Rite*, and by the close interrelationship between the questions raised in our certiorari petition in No. 82-848 and those in the newly-filed *Monsanto* petition.

This additional conflict of decisions among the circuits, as highlighted by the *Monsanto* petition, aggravates the present uncertainty as to the reach and meaning of this Court's ruling in *Sylvania*. At the same time, the conflict necessarily precludes equal and fair application of the antitrust laws, forcing diametrically opposed results in the different circuits in near identical factual situations. This will no doubt spur still additional litigation in the lower courts throughout the country. Prompt clarification and resolution by this Court is therefore appropriate.

C. There Is Also An Unmistakable Conflict Between The Sixth Circuit's Holding In *Service Merchandise*, The Seventh Circuit's Decision In *Spray-Rite*, And The Decisions Of The Second, Third And Eighth Circuits.

In *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), the court of appeals ruled—incorrectly, in our view—that proof of a dealer's complaints to a manufacturer about a competitor dealer's price cutting, along with proof that the manufacturer terminated the dealer in response to those complaints, is not sufficient to support an inference of concerted action for the purpose of section 1 of the Sherman Act. The *Sweeney* decision is directly relied on by the Sixth Circuit in *Service Merchandise*. Petition App. at 16a. The Second Circuit also follows *Sweeney*. *Schwimmer* v. *Sony Corporation of America*,

677 F.2d 946 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3362 (Nov. 9, 1982).

The Eighth Circuit, on the other hand, has rejected *Sweeney. Battle* v. *Lubrizol Corp.*, 673 F.2d 948 (8th Cir. 1982). And the *Spray-Rite* decision (684 F.2d 1226) by the Seventh Circuit is an even more recent rejection of the *Sweeney* ruling. The Sixth Circuit's decision in *Service Merchandise* aggravates the conflict among the circuits because the decision, as we demonstrated in our petition, ignores substantial direct evidence of concerted action. Petition at 20-21.

Thus, on this highly important and recurring question, basic to effective administration of the Nation's antitrust laws, the circuits are truly in hopeless conflict. The Second, Third and the Sixth Circuit (in *Service Merchandise*) are aligned in direct conflict with the decisions of the Seventh and Eighth Circuits. The conflict of circuit decisions has now been made even more "unmistakable". 51 U.S.L.W. 3362 (Nov. 9, 1982) (dissent of Mr. Justice White from denial of certiorari in *Schwimmer*).

CONCLUSION

For these reasons and the reasons stated in our petition, it is submitted that the petition for a writ of certiorari in No. 82-848 should be granted and that the judgment of the Sixth Circuit should be summarily re-

versed with instructions to enter judgment for petitioner Service Merchandise on the issue of liability.

Respectfully submitted,

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OCTOBER TERM, 1982

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SECOND SUPPLEMENTAL BRIEF FOR PETITIONER

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IN THE

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OCTOBER TERM, 1982

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SECOND SUPPLEMENTAL BRIEF FOR PETITIONER

On November 19, 1982, Service Merchandise Company, Inc. ("SMC") filed its certiorari petition in case No. 82-848. That petition is presently pending before the Court. On March 20, 1984, this Court decided *Monsanto Co.* v. *Spray-Rite Service Corp.*[1] The Court's decision in the *Monsanto* case strengthens and supports further the grounds on which we relied in the SMC petition. We therefore file this Second Supplemental Brief under Rule 22.6 of the Rules of this Court to call attention to the

[1] On December 29, 1982, we filed SMC's Supplemental Brief calling the Court's attention to the certiorari petition filed by Monsanto, the subsequent granting of which resulted in the Court's March 20 decision.

relationship between the *SMC* case and the *Monsanto* case and to suggest that the *Monsanto* decision requires the grant of certiorari in the *SMC* case.

ARGUMENT

A. The Relationship Between The Cases

SMC is engaged in the showroom, catalog and mail order business selling name-brand products of national manufacturers such as Amana Refrigeration, Inc. ("Amana") from its 110 showrooms located in 25 states. Petition at 2. After Amana received numerous complaints from its authorized distributors and dealers about SMC's low prices, SMC's business of selling Amana microwave ovens was destroyed pursuant to an agreement and concert of action among Amana and its distributors and dealers to fix the wholesale and retail prices of the ovens and to boycott and refuse to sell such ovens to SMC. *Id.* at 2-3. Like respondent Spray-Rite, SMC sued Amana alleging that such conduct constituted per se violations of Section 1 of the Sherman Act. *Id.*

The district court granted summary judgment dismissing SMC's per se claims and the Court of Appeals for the Sixth Circuit affirmed. The basis for both the dismissal and affirmance was that there was "insufficient evidence that a conspiracy or concerted action existed." *Id.* at 3-4. In the view of the courts below, the Amana activities which brought about the cutoff of SMC's supplies were only unilateral. *Id.*

In the *Monsanto* case, Spray-Rite's distributorship was terminated following complaints about its low prices. Spray-Rite then filed its complaint alleging the same per se price fixing and boycott violations as did SMC. Like Amana, Monsanto contended that its termination of Spray-Rite was unilateral. However, unlike the *SMC*

case, the district court submitted the case to the jury and the court of appeals affirmed the resulting jury verdicts of price fixing and boycott. Slip Opinion at 1-3, 10.[2] The evidence of concerted action in the *SMC* case is at least as substantial as that recounted by this Court in *Monsanto*. Compare Petition at 1-7, 21 with Slip Opinion at 10-13.

B. The Judgment Of The Court In The SMC Case Conflicts With This Court's Decision In *Monsanto*

In the *Monsanto* case, this Court in dictum held that conspiracy or concerted action could not properly be inferred merely from a showing that the manufacturer terminated a price-cutting distributor in response to or following complaints by other distributors. Slip Opinion at 4-5. There must be evidence that "tends to exclude the possibility that a manufacturer and nonterminated distributors were acting independently." *Id.* at 9. However, the Court affirmed the judgment of the Seventh Circuit holding that "there was sufficient evidence for a jury reasonably to have concluded that Monsanto and some of its distributors were parties to an 'agreement' or 'conspiracy' to maintain resale prices and terminate price-cutters." *Id.* at 10.

This "sufficient evidence" holding of the Court in *Monsanto*, highlights and establishes the essential error of the courts below in the *SMC* case. In the *SMC* case, the courts employed summary judgment procedures to deprive SMC of a jury trial in the face of undisputed evidence of concerted conspiratorial action which was more unrelenting and pervasive than that recounted by this Court in *Monsanto*. This is plain from even a cursory

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[2] Monsanto did not assert error as to the boycott finding. *Id.* at 13, n. 13.

comparison of the evidence recounted by the Court in *Monsanto* with the evidence recounted by the Sixth Circuit in *SMC*.

In *Monsanto*, price-cutting distributors were advised by the manufacturer that they would lose supplies if they persisted in their low prices. One distributor replied that it would comply with suggested resale prices. Slip Opinion at 10. A distributor's newsletter to his dealer-customers following his meeting with officials of the manufacturer reviewed the manufacturer's incentive and shipping policies and stated that every effort would be made to maintain prices. *Id.* at 11. Finally, the terminated distributor was told by the manufacturer that complaints from other distributors had been received about its low prices. *Id.* at 12-13.

By way of comparison, the Sixth Circuit in the *SMC* case found as evidentiary fact that the manufacturer Amana responded to the complaints from its dealers and distributors about SMC's low prices in the following manner:

(1) Amana recognized that it had a "need to eliminate any free riders [price-cutters] from its distribution chain." Its distributors and dealers told Amana that "such competition had to be eliminated" and requested the identity of SMC's supplier. At least one distributor refused to sell to SMC at Amana's request. Petition at 5. The district court's highly relevant finding substantially understating the number and timing of the refusals to deal with SMC was termed "clearly erroneous" by the Sixth Circuit. *Id.* at 12, n. 7.

(2) In order to further impede the price-cutters, Amana assisted its distributors in a price-fixing program whereby the distributors would sell to retail outlets only at prices agreed to among the distributors. *Id.* at 5-6.

(3) In response to calls for action from its distributors, Amana warned its distributors and dealers that sales to price-cutters like SMC would be monitored through Amana's computer tracking system and that sales to SMC by distributors and dealers would result in their loss of substantial economic benefits. *Id.* at 6.

(4) Amana entered written agreements with its distributors limiting the sales of Amana ovens to specified territories and customers. *Id.*

Finally, the concerted nature of Amana's dealings with its dealers and distributors to fix and maintain the resale prices of Amana products is demonstrated by the following undisputed testimony of the president of one of Amana's principal distributors (Davis-Watkins, a respondent here) concerning his meeting with his dealers:

Q. What did you tell the dealers you were going to do?

A. We told them at the time we didn't know what we could do. We listened more to them, and at the time we did not know of any action or counter action, other than we would endeavor to try to stop some way the pricing and the competition that they were experiencing from Service Merchandise. . . .

Q. You did not indicate to them that you were taking or going to take steps to see if you could stop the situation?

A. We told them we were investigating what the alternatives were toward stopping the situation.

Q. What did you do?

A. Well, basically, we tried to prevail upon Amana to help us stop the [sales to SMC]. . . . [*Id.* at 21][3]

---

[3] Similarly, it is undisputed that Amana warned another distributor "that penalties would be severe for selling to people such as Service Merchandise." *Id.* at 20, n. 10.

Amana did respond to this concerted request by announcing and implementing its computer tracking system to penalize those dealing with SMC. *Id.* at 6. This community of effort among Amana and its dealers and distributors to cut off SMC's supplies in order to stabilize price is the precise kind of joint collaborative activity which this Court in *Monsanto* held offended Section 1 of the Sherman Act.

We suggest that the holding of this Court in the *Monsanto* case that the jury be allowed to determine whether the evidence establishes the alleged per se violations is of crucial importance to the enforcement of the antitrust laws. The failure of the courts below in the *SMC* case to comport with this basic concept by their summary dismissal requires the grant of certiorari.

CONCLUSION

For the reasons stated in our petition, certiorari should be granted and the judgment of the Sixth Circuit should

be summarily reversed with instructions to enter judgment for SMC on the issue of liability.

Respectfully submitted,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENT AMANA REFRIGERATION, INC. IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

Respondent denies that the "*Questions Presented*" are as stated by Petitioner. Rather, Respondent asserts that the single, proper question presented is as follows:

> Did the court of appeals correctly affirm the district court's ruling that this case involved only non-price vertical restrictions to be tried to the jury under the rule of reason analysis mandated by *Sylvania?*

PARTIES TO THE PROCEEDINGS

Petitioner Service Merchandise Company was appellant below. Respondent Amana Refrigeration, Inc. was appellee below.

Amana Refrigeration, Inc. is a wholly-owned subsidiary of Raytheon Company. Other wholly-owned subsidiaries of Raytheon Company are: The Badger Company, Inc.; Beech Aircraft Corporation; Caloric Corporation; A.C. Cossor Limited (England); Electronics Nayarit, S.A. (Mexico); D.C. Heath, Canada, Limited (Canada); Iowa Manufacturing Company of Cedar Rapids, Iowa; Japanese Overseas Service, Inc.; Klasing G.m.b.H. (Germany); Heinz Kress G.m.b.H. (Germany); Kress Verwaltcngagesellschaft G.m.b.H. (Germany); Lexington-Electronic Realty Trust; Lexitron Corporation (Nevada); Lexitron Leasing, Inc.; Lexitron Marketing, Inc.; The Machlett Laboratories, Incorporated; Middlesex International Trade Corporation; PICCON, INC., Raytheon Air Control Company; Raytheon Air Control Company Mideast; Raytheon Aircraft Control and Landing Systems, Inc.; Raytheon Canada, Limited (Canada) Raytheon Educational Systems Company; Raytheon Engineering and Maintenance Company; Raytheon Europe International Company; Raytheon European Management Co., Inc.: Raytheon European Management and Systems Company; Raytheon Foreign Trade Company; Raytheon German Services Company; Raytheon Gulf Systems Company; Raytheon Halhleiter G.m.b.H. (Germany); Raytheon International Graphic Systems Company; Raytheon International Trade Company; Raytheon Leasing Corporation; Raytheon Logistics Support & Training Company; Raytheon Marine Sales and Service Company; Raytheon Middle East Systems Company; Raytheon Overseas Limited; Raytheon Procurement Company, Inc.; Raytheon Semiconductor

International Co., Raytheon Service Company; Raytheon Southeast Asia Systems Compay; Raytheon Submarine Signal Development Company; Raytheon Subsidiary Support Company, Inc.; Raytheon Systems Company; Raytheon Technical Assistance Company; Raytheon United Kingdom Limited; Raytheon Worldwide Company; Sedco Systems, Inc.; Seismograph Service Corporation; Speed Queen Company; Switchcraft, Inc.; TAG Semiconductors Limited; and United Engineers & Constructors Inc.

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The following abbreviations are used in this brief: "Tr." (trial transcript); "PX" (plaintiff's trial exhibit); "DX" (defendant's trial exhibit).

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENT AMANA REFRIGERATION, INC. IN OPPOSITION TO PETITION

Respondent, Amana Refrigeration, Inc. ("Amana") respectfully submits the Court should deny Service Merchandise Company, Inc.'s ("SMC") petition for a Writ of Certiorari seeking review of the Sixth Circuit's unanimous affirmance of the district court's judgment in this antitrust case brought by SMC attacking Amana's nonprice vertical restrictions in its product distribution system.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Middle District of Tennessee are correctly cited in the petition.

JURISDICTION

Amana does not question the jurisdiction of the Court.

STATUTES INVOLVED

With respect to the statutes cited in the petition, Amana asserts that the only relevant statute is Section 1 of the Sherman Act (15 U.S.C. § 1).

STATEMENT OF THE CASE

This case arose out of the efforts of Amana, in the face of intense interband competition, to encourage its distributors and dealers to continue to provide valuable pre-sale, point-of-sale, and post-sale services in connection with the distribution and sale of Amana microwave ovens through vertical non-price restrictions universally imposed on its distribution system. These efforts were challenged by SMC, a catalogue showroom company, because SMC was unwilling to accept the responsibilities of becoming an authorized Amana dealer and was, therefore, unable to obtain an adequate supply of Amana microwave ovens after Amana's imposition of more effective non-price restrictions in reliance upon this Court's decision in *Sylvania*.[1]

SMC employes a "no frills" approach to marketing that relies heavily upon the "presold" aspect of brand-name

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[1] *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

products. SMC prides itself on not providing pre-sale, point-of-sale or post-sale services such as trained sales persons, product demonstrations or cooking classes; nor does SMC display full model lines of a brand. Instead, SMC relies upon demand created by others to sell its brand-name goods. Accordingly, SMC is interested in offering for sale only certain models of highly promoted, brand-name products. TR. 125, 141-42, 193-96, 220, 1101-02, 1158-60.

Prior to 1978 Amana assigned each of its distributors an area of primary responsibility, but did not prohibit sales outside of the territory. PX 250. Amana's purpose in assigning distributorship territories was to encourage distributors and dealers to provide a high level of customer services and product promotion in an aggressive manner to meet interbrand competition.[2] TR. 2178-98. Amana deemed this marketing strategy essential to its success in the marketplace.

During the latter part of 1976, the Japanese manufacturers dumped a great number of microwave ovens on the United States market and, in a manner of weeks, Amana's dealer and distributor inventories built up to record levels. DX 28; TR. 2225-28. As a result of this product influx, many authorized dealers were willing to sell Ama-

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[2] Amana utilizes what SMC's marketing expert described as "a pretty wide-ranging, aggressive series of well-coordinated activities up and down the channel of distribution." SMC's marketing expert went on to acknowledge that exclusive distributorship territories promote interbrand competition by encouraging "a more aggressive selling from that distributor," thus making him "more effective in competition against its competitors." He also admitted that "strong intrabrand competition may reduce the propensity" of Amana distributors to engage in costly promotional activity. TR. 1117-18, 1093, 1147-48.

na microwave ovens to unauthorized, non-servicing dealers for resale outside the authorized dealer's sales area in order to claim certain promotional funds from Amana, while at the same time being relieved of the obligation to provide costly services to support the sale of those ovens. Transhipping, which previously had merely been a nuisance, became a serious interference with Amana's marketing strategy and threatened its survival in the microwave oven business. TR. 2228-32. "Transhipping" is known in the trade as a sale of products by an authorized distributor or dealer, often through what is known as a "diverter,"[3] to an unauthorized dealer for sale outside of the distributor's or dealer's area of primary responsibility so that his own market will not be adversely affected by the free-riding, unauthorized dealer.[4]

During this period, SMC was attempting to free-ride on the sales, service and promotional efforts of Amana distributors and dealers. Although SMC had access to several other brands of microwave ovens, SMC began, in 1976, to acquire Amana microwave ovens from diverters

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[3] A diverter is a broker of products whose purpose is to divert products to a destination or for a purpose different from what is represented when the products are purchased. TR. 124, 2980.

[4] A dealer would have little disincentive to sell to an unauthorized dealer in another market area who did not provide the required services. This was because the resulting loss of market development and the cost of customer and product services on transhipped goods was not a cost to the transhipping dealer but to the authorized dealers and distributor into whose territory the units were transhipped and retailed. Moreover, because the authorized dealer who transhipped and his distributor had been provided certain market development funds by Amana, they obtained a windfall on microwave ovens purchased from Amana but for which they would not incur market development and product support costs. TR. 2238-59.

after the Amana distributor in Nashville refused to supply it.[5] SMC wanted to sell the Amana microwave oven because of the demand that had been created by the costly efforts of authorized distributors and dealers and the post-sale product support, such as cooking schools, provided by Amana's authorized network, which services SMC refused to provide. By free-riding on the market development and product support services of others, SMC incurred lower costs associated with the sale and was usually able to sell the product at a lower price than an authorized dealer.[6] The reaction of the authorized dealers in the free-rider's area would be either to drop Amana products altogether, or to lessen substantially the quantity and quality of services. TR. 2237-38, 2271-74.

The sudden and significant increase in transhipping to non-servicing dealers, such as SMC, in 1976 and 1977 caused a marked reduction in the delivery of services provided by Amana's distribution system due to the free-rider effect. TR. 2225-39. Accordingly, Amana experienced a sharp decrease in its share of sales of domestic

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[5] For the same reason that transhipping to free-riders in *another* territory occurred, free-riding dealers were unable to purchase products from the distributor in their own territory. The distributor would not permit a dealer to free-ride upon him or the service-providing dealers in his territory, and for that reason refused to sell to such a free-rider. Thus, unauthorized dealers were unable to get products unless they could do it surreptitiously, perhaps through a diverter and always by transhipment.

[6] The unauthorized dealer could sell the Amana ovens at a lower price than the authorized dealers in his area because he purchased them at a lower price (since the selling-transhipping dealer profited from the receipt of development and product support funds without incurring development and product support costs) as well as because the unauthorized dealer does not provide pre-sale, point-of-sale or post-sale services. TR. 125, 1303-05, 2230-38, 2788-91.

countertop microwave ovens from 18% in 1976 to 11% in 1977. DX 23. Amana began to search for a method to halt this decline but it was advised that it would be imprudent to take any action because of the state of the antitrust law in early 1977. In October, 1977, in reliance upon the significant change in antitrust law announced in *Sylvania*, Amana imposed restrictions against selling outside one's assigned territory, dealer location restrictions and customer restrictions.[7]

After the implementation of these restrictions SMC and other free-riding dealers were unable to obtain an adequate supply of Amana microwave ovens because they either could not, or did not choose to, provide the required services. The restrictions have had the effect of substantially reducing transhipping and preserving the incentive to provide services. By confronting the free-rider problem with a change in its distribution system, Amana was able to stabilize and then to reverse its declining sales share trend. Amana's domestic sales share rose from 11% in 1977, to 12% in 1978, and to 13% in 1979.[8]

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[7] In October, 1977, and January, 1978, Amana changed its distribution system to assure that if product was shipped across territorial lines, promotional funds would be provided to service those products. Components of the system were: (1) exclusive territorial distributorships; (2) dealer location clauses; (3) dealer and distributor customer restrictions; and (4) transfer of promotional and service funds on transhipped products. PX 108, 115, 251; DX 27; TR. 2193-97, 2239-46, 2289-90.

[8] Amana's economic expert testified that in order to ascertain Amana's actual *market power* (distinguished from domestic sales share), one must necessarily take into account foreign microwave production by manufacturers who are now selling in the United States. One must also consider the number of units that could be shipped to the U.S. by foreign producers in the event the United States market became less competitive. Measuring market power accordingly, he calculated that Amana's market power expressed in terms of market share, was less than 10% in 1977, 1978 and 1979. This evidence was undisputed by SMC. DX 34; TR. 2594-2617.

SMC claimed that Amana's distribution system violated Section 1 of the Sherman Act. SMC alleged that the system is *per se* illegal in that it constitutes a group boycott of SMC, a scheme to enhance, maintain, or stabilize prices, a horizontal market division, or a *per se* illegal vertical restriction. SMC also alleged that the system is an unreasonable restraint of trade under the rule of reason. Amana denied that it distribution system was illegal or unreasonable under any theory.

Prior to trial, after the completion of discovery, Amana and SMC each filed motions for partial summary judgment. Amana's motion sought dismissal of SMC's four *per se* theories of liability. SMC's motion sought a judgment of liability upon the theories of group boycott, horizontal market division, price stabilization, and under the rule of reason. The district court denied SMC's motion and granted Amana's. In granting Amana's motion the court determined that, considering all of the evidence,[9] SMC could not make out a case of *per se* liability on any of these theories. The court determined that "in no material way . . . is [the case] distinguishable from [*Sylvania*]." 500 F. Supp. at 1248.

SMC was permitted to, and did, introduce in its rule of reason case before the jury all evidence it claimed supported its *per se* theories as probative of Amana's motive in imposing the vertical restrictions. 500 F. Supp. at 1249. The court's ruling on the summary judgment motions did not have the effect of excluding any evidence. At the close of all of the proof, SMC did not move for a directed verdict

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[9] In addition to the pleadings, depositions, exhibits and answers to interrogatories on file, SMC submitted several volumes of deposition extracts and documents obtained during discovery. The evidence SMC relies upon in its petition was before the court on the motions.

and the district court rejected SMC's request for jury instructions on each of its *per se* theories and again determined that the case should go to the jury only under the rule of reason mandated by *Sylvania*. After a seven-week trial, the jury returned a general verdict in favor of Amana and its distributor, Davis-Watkins Company.

SMC appealed its case and claimed error in the district court's action on both summary judgments, the district court's denial of *per se* instructions to the jury and the district court's jury charge. The Court of Appeals, in a unanimous decision, affirmed the trial court in all respects. The appellate court found that "no evidence exists to find that distributors and dealers joined together in unity of action to exclude SMC and that no evidence exists to find that Amana acted other than in its own economic interest. . . ." 686 F.2d 1199. It stated "there is no evidence of agreements between distributors or dealers to allocate markets" and "there is no evidence to support a finding of concerted action between Amana and its distributors or dealers for the purpose or with the effect of stabilizing the price of Amana microwave radarange ovens." *Id.* at 1201. It concluded "Amana's restrictions do not interfere with the setting of price by market forces but do require its distributors and dealers to sell the same product." *Id.*

REASONS FOR DENIAL OF THE WRIT

1. No Constitutional Issues Involved.

The petition does not set forth any issues requesting this Court to interpret or to apply the provisions of the United States Constitution. The petition is devoid of any Constitutional issues.

2. No Conflict With Prior Decisions Of This Court.

A. No Conflict With *Sylvania*.

This is a classic *Sylvania* case. It involves nothing more nor less than vertically-imposed, non-price restrictions in the form of territorial, location and customer restrictions, which were imposed by Amana universally on its distributors and dealers in order to assure that they would provide the valuable services necessary for Amana to be competitive in a highly competitive market.[10] The evidence of this was uncontradicted. The absence of any evidence of a *per se* violation and the overwhelming and uncontradicted evidence of vertically-imposed restrictions place this case squarely within the rule of *Sylvania*. The trial judge and the Court of Appeals so found. Reviewing the same evidence, the jury found that Amana's restrictions were reasonable and not anticompetitive.

SMC, in its appeal and now before this Court, attempts to twist what is without a doubt a *Sylvania* case into a *per se* case. SMC's theories in the context of the evidence, are nothing more than a challenge to the logic of *Sylvania*. To accept SMC's position would permit any antitrust plaintiff to avoid the logic of *Sylvania* by simply naming its case a *per se* case.

The weakness of SMC's argument is apparent. SMC now claims that it was denied its right to a trial by jury

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[10] It was uncontradicted that the microwave oven market is a highly competitive one. At the time that Amana imposed tighter restrictions in its distribution system, there were approximately 38 brands of microwave ovens being sold. TR. 2216. The uncontested evidence placed Amana's market share, properly measured, at less than 10% in 1977, 1978 and 1979. DX 34.

because of the trial court's refusal to permit the jury to consider its *per se* claims. SMC conveniently overlooks the fact that, in accordance with the district court's ruling on the motions for summary judgment, SMC was permitted to, and did, introduce all evidence it claimed supported its *per se* theories. In effect, SMC got two bites at the *per se* apple: one before trial on motion for summary judgment and a second after the close of proof when SMC requested the jury be given *per se* instructions. The district found before the trial, and again before charging the jury, that as a matter of law, the evidence presented did not make out a *per se* claim.

The crux of SMC's argument is that Amana's restrictions were intended to prevent price discounters from obtaining its products and this, without more, should convert the rule of reason analysis to a *per se* analysis on the theory that the restrictions are in fact a price-fixing scheme, or a boycott, or at least a horizontal allocation of territories. SMC has never been willing to admit that Amana's restrictions only discourage sales to free-riders—not to discounters—and make the market more competitive by making Amana more competitive with other manufacturers.[11] TR. 2245-46, 2261-62. *Sylvania*

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[11] SMC framed its price fixing theory as follows: "[T]he allocation of sales territories among Amana distributors and independent branches and the enforcement of the customer and location restrictions upon dealers was part of a scheme to prevent price competition between distributorship areas, both at the wholesale and retail levels, and to thereby stabilize prices within each distributorship area." 500 F.Supp. at 1250.

However, as the district court pointed out, SMC conceded in its response to Amana's summary judgment motion that Amana was not engaged in either resale price maintenance or price fixing. *Id.* SMC instead attempted to convert a vertical, non-price restriction into a *per se* violation by alleging that the restrictions enhanced price stabilization by restricting some aspects of intrabrand competition.

holds that a supplier has a legitimate interest in preventing "free riding." *Sylvania*, 433 U.S. at 54-59. A supplier such as Amana may utilize reasonable means to protect that interest. A ruling which characterized Amana's vertical restraints as *per se* illegal without submitting all the facts to a rule of reason test would ignore the teaching of *Sylvania*.

As the Court of Appeals emphasized, there is no evidence of any *per se* violation. All that SMC relies upon for its price-fixing and boycott theories are: (1) that SMC is known as a discounter; (2) that a few complaints of free-riding and the concomitant low price were made to Amana; and (3) that SMC did not obtain a sufficient supply of Amana ovens after Amana's imposition of its restrictions. SMC characterizes the complaints as "low price" complaints. In fact, as the evidence showed and the jury accepted, these complaints were directed towards SMC's free-riding.

The undisputed evidence was that Amana dealers do compete with each other intrabrand on price and service and many authorized Amana dealers are "price discounters," but these dealers provide the required services.

B. No Conflict With *General Motors*.

SMC's reliance upon *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966) is misplaced. *General Motors* involved a horizontal conspiracy by the dealers who "roped in" the manufacturer to enforce the conspiracy. The concern underlying the *per se* approach in *General Motors* is that a manufacturer should not be permitted to facilitate a dealer cartel. As the court below found, nowhere in this record is there evidence of a dealer or distributor cartel.

SMC's argument is that distributors and dealers "voluntarily respected territorial lines and observed customer restrictions prior to January, 1978," but since the restrictions placed in the system in 1978 were a clarification and strengthening of the previous distribution system, the whole system is "necessarily horizontal." SMC's Court of Appeals Brief at 47-48. The evidence is that prior to 1978, Amana's agreements designated primary areas of responsibility; this was as much as the law was throught to permit. *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 381 (1967). Although dealers and distributors were not restricted to sell only in their territories, they were required to devote their primary attention to that territory, and this requirement was imposed upon them by Amana as fully as the law permitted. TR. 2443-48. There was no evidence upon which SMC could rely to establish that Amana's territorial allocations originated with Amana's distributors who then "roped in" Amana to enforce an illegal horizontal market division.

The fact that a few dealers complained to Amana about SMC does not alter the vertical nature of the restrictions. Because a horizontal conspiracy among a manufacturer's distributors is not in the best interest of the manufacturer, a distributor-created horizontal conspiracy that involves the manufacturer can only be shown with proof that Amana was "controlled" by its distributors. *See, United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972); *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967). SMC produced no such proof.

3. No Conflict With Other Courts Of Appeals Decisions.

The Sixth Circuit's decision does not conflict with the decisions of other courts of appeals. SMC submits that the lower courts' rulings conflict with *Cernuto, Inc.* v. *United*

Cabinet Corp., 595 F.2d 164 (3d Cir. 1979) and *Spray-Rite Service Corp.* v. *Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3461 (U.S. Dec. 7, 1982) (No. 82-914). Amana insists that the Sixth Circuit appropriately followed *Sylvania*, and its holding does not conflict with *Cernuto* or *Spray-Rite*.

A. No Conflict With *Cernuto*

In *Cernuto* the Court of Appeals *assumed* that plaintiff could show that the manufacturer *terminated* him as a result of his competitor's complaints of low pricing. This assumption created, the court said, a "possibility" of a *per se* violation. The court made clear, however, that the use of a *per se* rule would be inappropriate if the termination was the result of defendant's own marketing strategy and judgment and was not motivated solely by considerations of price. 595 F.2d at 170.

In this case, the Sixth Circuit properly distinguished *Cernuto* rather than refused to follow it. As the court found, there was no such evidence as that assumed by the court in *Cernuto*. After three years of discovery and a full seven-week jury trial, SMC was not able to produce evidence to permit the inference of such a conspiracy.

B. No Conflict With *Spray-Rite*

The Seventh Circuit's opinion in *Spray-Rite*, although in our view incorrect, is not in conflict with the Sixth Circuit's opinion in the instant case. *Spray-Rite* involved a suit by a terminated distributor against its supplier-manufacturer. The Court of Appeals for the Seventh Circuit held that the terminated distributor may create an inference of a conspiracy to fix prices sufficient to go to the jury by showing that the manufacturer received complaints about plaintiff's pricing from other distributors and, *in response*, terminated plaintiff.

The instant case is different in two respects: (1) It involves not the termination of a "discount" distributor, but the nationwide application of Amana's marketing strategy to discourage sales to free-riders; and (2) there was no evidence that the imposition of the restrictions emanated from any source other than Amana. The undisputed proof was that Amana instituted its restrictions in response to the decline in sales share caused by the reduction in services resulting from free-riders who obtained the product by transhipment.

CONCLUSION

SMC's petition is a challenge to *Sylvania*. Unwillingness to acknowledge the authority of *Sylvania* pervaded its motion for summary judgment, its conduct at trial, its dissatisfaction with the jury instructions, its position on appeal to the Sixth Circuit and its request for a Writ of Certiorari.

The Sixth Circuit's decision properly follows *Sylvania* and there are no compelling reasons for this Court to grant the writ.

Respectfully submitted,

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